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The Aarhus Convention: towards a cosmopolitan international environmental politics

Duncan Weaver

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Abstract

This thesis investigates the Convention on Access to Information, Public Participation in Decisionmaking and Access to Justice in Environmental Matters (Aarhus). It assesses its normative contribution to International Environmental Politics (IEP). Via English School (ES) lenses, it gauges the degree of pluralism and solidarism in the Convention. More specifically, it evaluates Aarhus' role as a green human rights regime; scrutinises the contribution of Aarhus' trinity of procedural rights; offers a regime analysis; and asks (a) what Aarhus' association with democratisation is and (b) whether its success depends on Parties' political cultures. Three originality claims are made. First, this project offers a particular investigation into an under-researched, quite elusive Multilateral Environmental Agreement (MEA). Second, it applies pluralism and solidarism to a tangible research object. Third, it addresses the overlooked issue of cosmopolitanisation in IEP. Three key findings are drawn. First, Aarhus demonstrates the presence of, and contributes to, a greener European international society. Second, Aarhus has considerable solidarist potential, offering tools for cosmopolitan human empowerment in IEP. Third, pluralist realities retain distinct influence. Cosmopolitan empowerment may be emerging, but it is still nascent. Sovereignty remains, and this is welcomed. Tentative cosmopolitanisation of political orthodoxies is morally desirable and practically feasible. Evolutionary reform of the statist status quo is more agreeable than revolutionary change. World society values, of the sort enacted by Aarhus, help render IEP more ethically ambitious and human-oriented. But they will not emerge without a stable political framework in which states can institutionalise them. Aarhus demonstrates that whilst IEP remains *International*, it can still be enriched by humanity, which states must accommodate if they are to be legitimate international citizens, exercising responsible sovereignty, in the twenty-first century.

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1 Introduction

The Aarhus Convention celebrated its fifteenth anniversary in 2013. Stakeholders lauded it as a pioneer of green transparency and a symbol of socialisation between East and West. Yet, besides some quarters of Brussels and Geneva, the anniversary went unnoticed. Such is Aarhus' relative anonymity. It is a pioneer of rights-based green multilateralism. Whilst most Multilateral Environmental Agreements (MEAs) cover states' duties towards each other, Aarhus imposes duties on states that are designed to protect citizens (the public) and society (the public concerned) (UNECE 2000: 1). Aarhus therefore assigns *rights* to humans and *responsibilities* to states, bearing a resemblance to a solidarist cosmopolitan harm convention (see Linklater and Suganami 2006: 8; Elliott 2006).

Aarhus has vast potential: to empower humans, democratise states, entrench responsible sovereignty, harmonise East and West, and reduce the risks, 'in the field', of imposed environmental harm. But fifteen years after signature, stakeholders *still* complained, in fieldwork for this thesis, of poor awareness of the Convention: both in public administrations and societies. The common sentiment was gauged that whilst Aarhus offers a vital human-oriented contribution to International Environmental Politics (IEP), it eludes not only most of the citizens who are assigned Aarhus rights by governments, but most of the officials employed by those governments as well. Numerous interviewees, and many delegates during embedded work, voiced the concern that unless officials are tasked with administering the Convention, they will simply be oblivious to its very existence.

This thesis acknowledges not only such a lack of public awareness. It also notes a lack of discrete Aarhus scholarship. A core of Aarhus articles exists, most and the best of which

emanate from lawyers. A handful of references to Aarhus surfaces in the overt IEP corpus. This doctorate remedies the lacuna, and its key originality claim is thus to offer a very particular and extensive investigation into an under-researched but crucial MEA.

To this end, nine substantive chapters follow. Chapter 2 discusses how the project studied Aarhus via English School (ES) lenses. It acquaints the reader with the ES and its ideal types of international society, pluralism and solidarism. It shows how the thesis follows Weinert (2011) in applying ‘thin’ state-oriented pluralism and ‘thick’ human-oriented solidarism to a ‘real’ research object, to evaluate the degree of state-centrism and cosmopolitan potential therein. This enables an assessment of Aarhus’ normative contribution to IEP.

Chapter 3 offers the research design, discussing the operationalization of pluralism and solidarism, before disclosing the key research question and five auxiliaries. The key question asks: What contribution has the Aarhus Convention made to the normative progress of post-Cold War European IEP? The auxiliaries, discussed in detail in Chapter 3, take two forms, for documentary work and interviews respectively. Thereafter, the use of an ES approach is justified, as is the employment of a single case study. Finally, a tripartite methodology is disclosed, involving (a) documentary analysis, (b) interviews and (c) embedded participant observation.

Aarhus’ origins and purpose are discussed in Chapter 4. The context in which Aarhus emerged is covered, with reference to two civilising and socialising dynamics. It is argued that the Cold War’s end, and the literal and figurative collapse of the barriers between East

and West, were integral to Aarhus' emergence. The latter half of Chapter 4 situates the Convention in the broader corpus of international environmental and human rights law.

The next three chapters assess Aarhus' flagship contribution to IEP, its trinity of procedural rights. Pillar one, on information access, is scrutinised in Chapter 5. The chapter gauges a civilising impact, given Parties' mandated transition from a 'need-to-know' to a 'right-to-know' culture. It is argued that pillar one codifies the cosmopolitan all-affected principle. Whilst Aarhus' disclosure provisions do not emancipate humans *per se*, they offer the tools with which citizens can alter and improve their own circumstances by possessing the entirety of knowledge needed to influence environmental decisions. The pillar is deemed a tool for preventing and reducing imposed harm. Human autonomy is sanctified, despite a prevalence of state consent and the indecipherability of environmental data.

Pillar two, on public participation, is evaluated in Chapter 6. The pillar was found to be a tool for human empowerment and dialogue, the latter a means for preventing imposed harm. The pillar bears a resemblance to the qualities of a cosmopolitan harm convention. As with pillar one, this pillar places great value on human autonomy. Solidarist rationales were, however, tempered by more pluralist realities. The risk was found that public participation may become purely NGO participation; problematic assumptions of NGO superiority compounded NGO opacity; power asymmetries were gauged between both laypersons and NGO delegates, and state officials and non-state actors; and the risk was identified that dialogue may stifle healthy disagreement by railroading decisionmaking consensus and marginalising quieter, more peripheral public voices.

Chapter 7 investigates the final pillar of the trinity, justice. Great cosmopolitan potential was identified here, not least given the pillar's presence as an outcome of, and safeguard for, the previous pillars. Pillar three is again a procedural tool for human empowerment, enabling citizens to hold states accountable for environmental illegalities and procedural improprieties. The key impediment to cosmopolitanisation was the costs that active justice-seeking citizens must incur, in terms of time, effort and money. Nevertheless, evidence suggested that the pillar draws Aarhus close to the qualities needed in a cosmopolitan environmental harm convention.

A regime analysis ensues in Chapter 8. This involves an assessment of Aarhus' normative potential, cognitive potential and institutional potential. Considerable solidarist potential was identified, *inter alia*, in Aarhus' norm enforcement potential, especially in the Compliance Committee's approximation to a court, and its creation of case 'law'. Further, the provision for human individuals to directly lodge their own allegations of state contraventions is of great import. This is because, under this provision, individuals can alter state practices: if, in a compliance case lodged by a citizen, a state is found to have acted in non-compliance, and takes remedial measures, the alleging citizen is *the very source of that state reform*. This is most significant. Whilst attenuation of sovereignty was not observed, it was clear that cosmopolitan values had been transfused into orthodox IEP: the invaluable human element of international affairs had been imparted upon the statist status quo. Sovereignty had become more responsible.

Such solidarist human-orientation was also observed in Aarhus' provisions that citizens should exercise their Aarhus rights (a) without persecution and (b) irrespective of their nationality or abode. Borders are rendered relatively immaterial in the Aarhus region:

anyone can benefit from the Convention if they are positioned inside a Party's territory; they need not be a citizen of that Party. The solidarist proclivity to go 'beyond the border' and turn to a society of states, alongside the human element, was evident in the possibility for *any* state to accede to Aarhus, irrespective of UNECE membership; the likelihood of the procedural trinity's global expansion, with reference to current developments in Latin America and the Caribbean; fruitful cross-pollination between Aarhus and other global fora; and healthy dialogue between officials and citizens in Aarhus' internal proceedings.

However, such solidarism was tempered by more pluralist realities. Chapter 8 observed such realities in a lack of non-UNECE accession, the negligible likelihood of a much-demanded 'global Principle 10' treaty, the residual prevalence of state consent, erratic regime financing, and the compliance mechanism's susceptibility to circumvention and participatory deficits.

Democracy is the concern of Chapter 9, which is interested in (a) the degree to which Aarhus is associated with democratisation in post-Cold War Europe and (b) whether the rigour of implementation depends on Parties' political cultures. Work for this chapter found that Aarhus was relatively successful in the 'western' EU and Scandinavia, which had acclimatised effectively to Aarhus' stricter regulations. The chapter argues that these advanced democracies already have the regulatory architectures needed for successful implementation, plus cultures of tolerance and participation. Fieldwork gauged two presuppositions behind these democracies' implementation: (a) a need for permissiveness and progressiveness in governance, and (b) a need for more active environmental citizenship. This is not to deny the lack of a 'pillar three' EU directive (the first two pillars have their own directives); the prevalence of narrow *locus standi* practices in the advanced

democracies as much as the EECCA (Eastern Europe, Caucasus and Central Asia) territories; some residual mistrust between officials and citizens; and inequities within the EU.

In reference to the EECCA region, Chapter 9 found that it can be difficult, and occasionally mortally dangerous, for citizens to exercise their Aarhus rights. Autocratic legacies were found to impede implementation in the EECCA region, hindering attempts to reconcile East and West in a more expansive European international society. Whilst a common sentiment places great value on the Convention's democratisation and capacity-building endeavours, there remained limited suspicion of Western ulterior motives, not least given the financial and facilitative role played by the Organisation for Security and Cooperation in Europe (OSCE) and North Atlantic Treaty Organisation (NATO). Occasionally, the researcher gauged residual scepticism of 'good governance' altogether, and an occasionally uneasy sense of 'forced harmony' between state, society and judiciary.

The ultimate conclusion, in Chapter 10, is tripartite. Firstly, the project finds that Aarhus demonstrates the presence of, and contributes to, a *greener* European international society, in which states on both sides of the former Cold War divide are increasingly socialised according to their green democratic concerns. There is a sense of growing identification not only between states, but between states and citizens. There is a sense that states are increasingly *attuned* to green vulnerabilities. Further, Aarhus sets a stricter, greener, more democratic standard of civilisation in this society. The substance of this standard of civilisation is the procedural trinity, which Parties must apply to be deemed legitimate in the eyes of their counterparts and citizenries.

Secondly, the project finds that Aarhus has vast solidarist potential. It demonstrates that IEP can achieve palpable cosmopolitan progress, if states use procedural tools to empower humans to help themselves and alter their own circumstances via political influence. Aarhus demonstrates that human-oriented progress need not be a utopian fiction: it can be achieved if states, IGOs, regimes and international bureaucracies collaborate to factor the invaluable human element of international affairs into governance practices. Provisions for participatory dialogue and citizen contributions to the statist status quo will afford greater legitimacy in IEP. Aarhus may not be a pure cosmopolitan harm convention, but it proves that IEP can be incrementally rendered more solidarist in a manner that is both sympathetic to the sanctity of sovereignty, *and* eager to enhance human autonomy.

This leads to the final finding, which is that Aarhus demonstrates the presence and possibility of tentative, piecemeal cosmopolitanisation in IEP. This is progressive *and* prudent, feasible *and* desirable. That Aarhus achieves *evolutionary*, rather than *revolutionary*, progress is welcomed by this thesis. Incremental cosmopolitanisation is bounded in the comfortable familiarities of multilateralism, yet such orthodoxies can be, and have been, enriched by humanity. Sovereignty breathes life into the Convention, as it breathes life into every instance of multilateral diplomacy and international law. The Westphalian system, in which states interact on a formally equal basis, offers the structure in which Parties can institutionalise their shared norms of green transparency.

But whilst sovereignty remains, it has not remained the same. Aarhus demonstrates that it is possible, and very desirable, for states to exercise *responsible sovereignty*, a mature, legitimate, human-oriented sovereignty, enriched by humanity. States exercising responsible sovereignty can serve, in ES parlance, as IEP's 'good international citizens'.

The thesis concludes that it would have been anomalous to *not* have identified the pluralist realities observed in this investigation. Aarhus, after all, embodies a society of states, each united in their concern for green transparency, democracy and procedural propriety. It is managed under the auspices of an IGO, following the well-worn path of international law, an invaluable orthodoxy that is used time and again by states to solve shared problems. The thesis joins Falkner, concluding that “the persistence of the institution of sovereignty acts as a constraint on the transformative force of global environmentalism, channelling it into modes of political organisation and governance that can for the most part be accommodated within the evolving structures of international society” (2012: 516). That is a good thing. Cosmopolitan world society values should indeed emerge, but they should *complement* multilateralism. Under this logic, Buzan’s fried egg metaphor has great purchase: the thicker institutional yokes of regional international societies, such as this greener European society, “would rest on, and share, the common ‘white’ representing the global level” of cosmopolitan world society values (Ibid: 236). IEP is better off taking what it has – states, sovereignty, norm-oriented regimes and international law – and enriching them with humanity. From this angle, cosmopolitanism is very much a “moral lubricant that helps the society of states to run more smoothly” (Linklater 2002: 137).

2 Literature Review¹

A pluralist society...is concerned with reducing inter-state harm and incorporates 'international harm conventions' within its institutional framework, whereas a solidarist society...incorporates 'cosmopolitan harm conventions', designed to reduce harm done to individual citizens located in separate communities.

Linklater and Suganami (2006: 8)

...much ecological thinking and almost all environmental practice has tended to follow the two principal dimensions along which the normative structure of international society has evolved: the move towards more solidarist forms of interstate cooperation on the one hand, and the emergence of new forms of governance beyond the state on the other.

Hurrell (2007: 224)

Via English School (ES) lenses, this thesis assesses Aarhus for evidence of pluralism and solidarism² in order to gauge its normative contribution to IEP, and its cosmopolitan potential. The ES³ approaches IR in neither a realist nor liberal way. It observes three

¹ Chapter 3 reveals how the doctorate operationalises ES theory in a palpable research design. The goal here is to acquaint the reader with the ES theoretical framework.

² The pluralist-solidarist debate has as long a provenance as the ES itself, following a course similar to the communitarian-cosmopolitan dilemma (Brown 1992; Rengger 1996).

³ My understanding of the ES, international society, and pluralism/solidarism was aided by: Bain (2009), Bellamy (2005a), Bull (1966, 2002), Bull and Watson (1984), Buzan (2001, 2004), Donnelly

concurrent political worlds in which international relations are conducted: a realist system, rationalist society and revolutionist cosmopolis (Wight 1991). Each is an abstract imaginary against which ‘real world’ events can be assessed. Characteristics of each can be identified in the practice of IR. The ES is normatively predisposed towards an international society approach, a *via media* between systemic anarchy and cosmopolitan utopia (Linklater and Suganami 2006: 155). Advocates of an international society approach argue that “despite the formally anarchical structure of world politics, interstate relations are governed by normative principles in the light of which states can, and to a remarkable degree do, behave reasonably towards one another” (Ibid: 29-30).

Bull’s system-society distinction should help delineate realist anarchy from rationalist order. Systems emerge “where states are in regular contact with one another, and where...there is interaction between them sufficient to make the behaviour of each a necessary element in the calculations of the other” (Bull 2002: 9-10). In anarchy, ‘regular contact’ is neither productive nor pleasant. States calculate adversaries’ intentions, foresee the security ramifications, and respond. Under realist lenses, and neorealist ones in particular (Waltz 1979), states are like atomised billiard balls. Each collision on the billiard table has manifold impacts, causing other collisions. But societies emerge when a group of states, “conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of *rules* in their relations with one another, and share in the working of common *institutions* (Ibid: 13; emphasis my

(1998), Dunne (2010), Epp (1998), Fawn and Larkins (1996), Gong (1984), Grader (1988), Hurrell (2007), Jackson (1996, 2000, 2009), Keene (2009), Linklater (2005, 2007, 2011, 2011b), Linklater and Suganami (2006), Little (2000, 2009), Manning (1975), Navari (2009a, 2009b, 2009c, 2014), Navari and Green (2014), Rengger (1996), Suganami (1983), Vincent (1986), Weinert (2011), Wheeler (1996, 2000), Wheeler and Dunne (1996), Wight (1991), Williams (2005) and Wilson (1989).

own). Deliberately seeking a society, states register the risks of anarchy and purposefully try to mitigate them. Where possible, they pursue shared interests, address shared concerns, and institutionalise collective norms. In an international society, Westphalian structures of sovereignty and anarchy remain. But they are used for positive ends. In the ES, a broader power panorama reveals possibilities for conflict *and* cooperation.

International society is a cautiously hopeful concept. It retains the truths of sovereignty and anarchy, and does not invest false hope in a nascent cosmopolis. This is not to deny the presence of cosmopolitan ‘world society’ values (Buzan 2004: 70), visible in global civil society, the amplified role of NGOs, the prevalence of global public opinion, and attempts to achieve a more inclusive and participatory governance⁴ that surpasses borders. This thesis argues that world society values play a vital role in the Westphalian structure of sovereignty, which is unlikely ever to dissipate. Such values help cosmopolitanise the orthodoxies of international relations (Payne and Samhat 2004). In an international society, states use sovereignty as a tool with which to try to avoid harming each other. At the very least, sovereignty is a lowest-common-denominator: a springboard from which to find shared concerns, and collectively address them. The extent to which cosmopolitan values pervade a society of states depends upon the degree of pluralism and solidarism evident in the society. Pluralism and solidarism are the two ideal types of international society that surface in the ES corpus. They are abstractions, against which to assess research objects, and are discussed below.

⁴ My understanding of (green) governance, civil society, public spheres and their affinities with a more cosmopolitan, flexible political world was aided by: Biermann and Pattberg (2012a), Bohman (1999), Eckersley (2004), Elliott (2006), Falkner (2003), Fraser (2007), Hale and Held (2011a), Jönsson (2013), Keohane (2011), Khagram (2006), Klinke (2012), Mason (2005, 2006, 2008), O’Neill (2009), Ostrom (2012), Rosenau and Czempiel (1992), Torgerson (1999) and Yamin (2001).

Pluralism

...pluralism describes 'thin' international societies where the shared values are few, and the prime focus is on devising rules for coexistence within a framework of sovereignty and non-intervention.

Buzan (2004: 59)

A pluralist society seeks just enough international order to mitigate the risks of anarchy. Coexistence rules are followed as, “like rules of the road, fidelity to them is relatively cost free but the collective benefits are enormous” (Dunne 2010: 145). Such rules offer

...a structure of coexistence, built on the mutual recognition of states as independent and legally equal members of society, on the unavoidable reliance on self-preservation and self-help, and on freedom to promote their own ends as subject to minimal constraints (Ibid: 145).

This notion of coexistence coheres with Buzan’s conception of pluralism:

Under pluralism, coexistence is rooted in the self-interest of the states composing interstate society. Self-interest...stretches to *cooperation* in pursuit of a *liveable international order*, but it keeps the focus on differences among the states and does not require that they agree on anything *beyond the basics*, or that they hold any common values other than an interest in survival and the avoidance of unwanted disorder (2004: 145; emphasis added).

Hesitant to go ‘beyond the basics’ of securing a ‘liveable international order’, pluralism does not usurp the above ‘rules of the road’: it “does not require moving much beyond the raw self-centredness and self-interest of egoistic sovereign actors – only that they recognise that their own survival and self-interest can be enhanced by agreeing some basic rules with the other actors in the system” (Ibid: 143). Under this logic, states would take the multilateral steps needed to safeguard a liveable order, thus likening international society to an eggbox (Vincent 1986: 124), affording closeness *and* cushioning. This helps states remain close enough for multilateralism, whilst being fortified by borders. By ‘leaving the border open’, and retaining scope for ‘beyond the basics’ multilateralism at states’ discretion, normative progress is not foreclosed. But the focus is primarily on coexistence via non-intervention, mutual respect for sovereignty, and mutual preservation of territorial integrity. Good international citizenship (Gilmore 2014; Wheeler 1996, 2000) entails little more than a nod across the diplomatic garden fence. Contra solidarism, the pluralist preservation of a liveable order would not entail intervention for cosmopolitan ends, or intervention to enforce culturally contingent, universal rights. Under pluralism, shared norms are pursued if possible and preferable. But states’ diversity precludes ‘thicker’ solidarities. Heterogeneity is valued; the political world should remain diverse. The imposition of the problematic ‘universal’ good on particular jurisdictions is deemed undesirable and infeasible.

Under this communitarian framework, states evince practical association, a relation among actors “engaged in the pursuit of different and possibly incompatible purposes, and who are associated with one another, if at all, only in respecting certain restrictions on how each may pursue his own purposes” (Nardin 1983: 9). Pluralism is voluntarist, “not only in the

...sense that if people do not accept an ethical view it is unlikely to receive much attention ...but also in the strong sense, in that it is *our* [particular, not essentialist or universal] creation and acceptance of the norms of international society that alone creates the obligation to follow them” (Rengger 1996: 72). Sovereignty dictates ‘our’ creation of the norms for which Rengger is concerned. Without sovereignty, states are simply unable to create and influence an international society. For Jackson, sovereignty “is one of the very few clusters of important political values...around which the political world can rally and unite: not democracy, not human rights, not the environment, but sovereignty” (2000: 43).

States are the referents for concern under pluralism. They are both the saved and saviours. States exhibiting pluralism seek international harm conventions that prevent harm suffered and perpetrated by states. With this in mind, some strong affinities exist between pluralism and the environment. For Hurrell, the state remains; non-state actors “cannot themselves fulfil the core functions of the state” and “usefully supplement but only rarely supplant the state” (1994: 159). Under pluralism, though, the state does more than cunning calculation. It is capable of acting in a restrictively other-oriented as well as self-oriented way. It seeks a limited international interest, to preserve a liveable order. Environmental harm, a threat to liveable order, and subversive of state boundaries, requires pluralist action by states (Jackson 1996: 189). If pluralism is international ‘weak altruism’, a “blend of the ethical and the self-interested” (Rengger 1996: 72), in which state security agendas accommodate limited multilateralism to pursue bearable coexistence, then the environment coheres with, and indeed requires, a pluralist political framework. For Falkner, environmentalism’s rise on the agenda of international society “has gone hand in hand with a reaffirmation of the centrality of...sovereignty as a defining principle of environmental management” (2012: 516). Solidarism, for Falkner, has not transformed IEP. He notes that states’ environmental

responsibilities have arisen via a suite of MEAs⁵ and institutions that enhance state power: “Strong solidarist visions of a post-Westphalian form of global governance have had only a limited impact on the international practice of environmental protection” (Ibid: 516). Eckersley, a cosmopolitan visionary of a ‘green state’, would agree:

...international society is...*thin*...in that any common good arising from such [multilateral] bargains is...the aggregation of the satisfactions of utility-maximising states. Nonetheless, regimes...provide a reflection of a *rudimentary moral community* based on a certain degree of trust...[which] enables international governance to take place despite the absence of a central international government (2004: 29; emphasis added).

Under pluralism, the multilateral ‘common good’ results from self-oriented bargaining. In balancing self- and other-oriented interests, states address shared concerns if the benefits of cooperation outweigh the costs. This is a fragile common good, conditional on (a) state consent, (b) the cooperation being of national *as well as* international interest, and (c) the presence of limited diplomatic trust, enabling states to have confidence that anarchy can be mitigated, and bearable order achieved.

Solidarism

Solidarism is about ‘thick’ international societies in which a wider range of values is shared, and where the rules will be not only about coexistence, but

⁵ This thesis situates Aarhus within the broader suite of MEAs, institutions, international human rights laws and informal arrangements in Chapter 4.

also about the pursuit of joint gains and the management of collective problems in a range of issue-areas.

Buzan (2004: 59)

Solidarism is more ethically ambitious than pluralism. It asks more of states, demands a stricter, more other-oriented agenda, and is associated with enforcing human rights inside states (Bellamy 2003, Donnelly 1998, Linklater 2011b, Vincent 1986, Wheeler 2000). For Dunne, a multilateral manoeuvre towards human rights is “the *most obvious indicator* of a move beyond a pluralist international society” (Ibid: 150; emphasis added). And for Buzan, “The joint pursuit of human rights is by far the best-developed theme in the solidarist literature” (2004: 149). In a solidarist international society, citizenship, nationality and domicile are relatively immaterial. Human rights know no borders; responsible sovereignty dictates that states, as good international citizens⁶, should enforce human rights when they have been unequivocally violated. The logic is rooted in Feinberg’s understanding of harm: failure to rescue constitutes harm *per se*. Linklater writes that for Feinberg: “a decision not to assist someone...drowning must count as punishable harm, particularly when there is little or no risk to the person...in a position to rescue...[T]he failure to rescue...is not...less blameworthy than pushing a victim into treacherous waters in the first place (2011: 58).

States evincing solidarism internalise other-oriented ethics in their domestic laws, practices and cultures. Internalisation situates such ethics at the state’s political core. For Shue,

⁶ Good international citizens, under solidarism, oppose “the moral deficiency in pluralism, notably the apparent willingness to overlook, in the interests of international order, the harm and injustice often inflicted by states on their own citizens” (Gilmore 2014: 4).

writing in reference to the environment, international interests are “after-thoughts until they are incorporated...into how national interests are conceived. National interests need to be shaped from the beginning by a commitment to a just international order...Serious ethics operates at the centre, not the fringe, of conceptions of legitimate interest” (1995: 457). The international interest is therefore stronger in solidarism than pluralism, and commensurately more concerted. A solidarist society demonstrates purposive association between states, a relation “among those who cooperate for the purpose of securing certain shared beliefs, values and interests, [and] who adopt certain practices as a means to that end” (Nardin 1983: 14).

By internalising⁷ such stricter other-oriented ethics, states are, in ES parlance, adhering to a stricter, more legitimate⁸ standard of civilization⁹. This enables states to capture the ethical ‘high ground’ of legitimacy, and obtain a sense of belonging to a solidarist society. For

⁷ Internalisation involves “the actor’s sense of its own interests [being] partly constituted by a force outside itself, that is by the standards, laws, rules and norms present in the community...A rule will become legitimate to a specific individual, and therefore become behaviourally significant, when the individual internalises its content and reconceives [its] interests according to the rule” (Hurd 1999: 388).

⁸ Legitimacy is defined as an actor’s belief that “a rule or institution ought to be obeyed. It is a subjective quality, relational between actor and institution, and defined by the actor’s *perception* of the institution. The...perception may come from the substance of the rule or from the procedure or source by which it was constituted. Such a perception affects behaviour because it is internalised by the actor and helps to define how the actor sees its interests (Hurd 1999: 381; emphasis in original). For Biermann and Gupta, legitimacy is adherence to “established legal norms and requirements, or...recognised principles or accepted rules and standards of behaviour. Core elements of...legitimacy are the acceptance and justification of authority. Acceptance relates to the way in which rules or institutions are accepted by a community as being authoritative. Justification relates to the reasons that justify the authority of certain rules or institutions” (2011: 1858).

⁹ See Gong (1984). Linklater (2005, 2007) has devoted much effort to assessing the role of civilizing processes in international society. In reference to the standard of civilization, it should be noted that – however obvious this may seem – legitimate states comply with legitimate rules. The internalisation of such rules is “a function of states pursuing their interests, where these have been conditioned by a community standard” (Hurd 1999: 397). For Florini, legitimate rules are “codified in international law. The members [of an international society]...act according to recognised rules and interpret the meaning of each other’s behaviour according to those rules” (1996: 376).

Navari, an indicator of such a standard of civilization today is “adherence to a human rights code, since in the contemporary state system the measure of belonging would appear to be acceptance of...basic civil society conventions such as the rule of law or accountable administration” (2014: 217). Crucially for this thesis, Navari considers Deutsch’s idea of “two-way channels of communication between elites and a citizenry as the critical factor” in determining the contemporary standard of civilization (Ibid: 218). Donnelly would agree, writing that “internationally recognized human rights have become very much like a new international standard of civilization” (1998: 1). For him, “A positive and universal international standard of civilization emerged only in the idea of human rights” (Ibid: 11). Donnelly elicits “procedural grounds for claiming that incorporating human rights into the regulative norms of international society represents moral progress” (Ibid: 20). He claims that human rights “rest on a moral claim that we are all equally human and, as a result, are equally entitled to certain goods, services, opportunities and protections” (Ibid: 21). It is, from this angle, understandable that Payne and Samhat find “threads of cosmopolitanism... in the discourse of human rights” (2004: 32).

Indeed, solidarism locates humans at the heart of such concerns. But it remains an ideal type of *international* society, and does not envisage a nascent cosmopolis.¹⁰ Buzan gauges two dynamics by which a society of states may become more solidarist:

- (1) States might abandon the pursuit of difference and exclusivity as their main *raison d’être*, and cultivate becoming more alike as a conscious goal...
- (2) States might acknowledge common values among them that go beyond survival and coexistence, and which they agree to pursue by coordinating their policies,

¹⁰ For Dunne, “solidarism is an *extension* of an international society, not its transformation” (2010: 146; emphasis in original).

undertaking collective action, creating appropriate norms, rules and organisations, and revising the institutions of interstate society (2004: 146-147).

Sovereignty remains, under solidarism. But scope exists for a more responsible sovereignty than that possible under pluralism. For this reason, this thesis refers to cosmopolitanisation, the means by which solidarist ethics render political orthodoxies more cosmopolitan. This doctorate posits that ‘world society’ values can enrich existing orthodoxies, by revealing new “spaces in which politics can take place and where new sorts of communities can develop” (Williams 2005: 21), and by reforming old political spaces by rendering them more human-oriented. This logic of cosmopolitanisation surfaces in Gilmore’s idea of solidarism as being “centred on the notion that justice for...human beings is important and that states may no longer be the only actors of significance...At the same time, the implication is that ...[states] will remain the actor primarily responsible for the provision of human security” (2014: 4). Writing in reference to intervention, Gilmore’s solidarism has purchase for IEP. He notes that accommodating human concerns in policymaking merits “a continuous practice of dialogue, an appreciation of the multiplicity of...interests that characterise the local Other, and a willingness...to adjust...practices in light of this” (Gilmore 2014b: 18). Under solidarism, power orthodoxies can and should be modified to become more other-oriented.

Solidarism is conducive to environmental protection in three key ways. Environmental protection, firstly, is a global good: “The Earth is one but the world is not. We all depend on one biosphere for sustaining our lives” (WCED 1987: 27). Incongruence¹¹ between the

¹¹ Regarding incongruence, Hurrell cites Caldwell’s claim that “experience should have taught us that a complex...biosphere cannot be addressed effectively for protection...by a fragmented and uncoordinated political order” (in 1994: 146-147).

‘one Earth’ and the fractured Westphalian world makes it necessary for (literal and figurative) boundaries to be reconciled: global problems need global solutions. Green harm knows no borders; its solutions are hindered by piecemeal cooperation relying on diplomatic reciprocity, coexistence and reluctance to achieve anything ‘beyond the basics’ of a bearable order. For this reason, Buzan deems environmentalism a missing institution of international society, which “can, up to a point, be fitted into a pluralist logic of coexistence, but...can also become a solidarist project” (2004:186). For Hurrell, successful global environmentalism requires leaving “minimalist ...coexistence and [embracing] the creation of rules and institutions that embody notions of shared responsibilities, that impinge heavily on the domestic organisation of states, that invest individuals and groups within states with rights and duties, and that seek to embody some notion of the planetary good” (1994: 149).

Second, states are said to be increasingly unable to safeguard environmental protection (and domestic order more broadly). In reference to state capacity, Hurrell finds that there is “a great deal more ‘law and order’ internationally than there is on the streets of an increasing number of states” (Ibid: 155). If, as deeper ecologists may argue, states are the problem, not solution, the corollary is that non-state actors should take the helm of environmental decisionmaking.

This leads to the third link between solidarism and the environment. Environmental change is said to erode states’ normative appeal. Hurrell views an emerging planetary consciousness “in the mobilisation of new social actors” such as the global environmental movement, “one of the most significant...pillars of an emerging transnational civil society ...which challenge the hegemony of statist world politics (Ibid: 147). Hurrell writes that

“global environmental interdependence has given greater plausibility to visions of a cosmopolitan global community” (Ibid: 162). Solidarism’s aptness for environmental protection causes Hurrell to judge that the ecological challenge calls into question “both the practical viability and the moral acceptability of state-based pluralist international order” (2007: 222). Eckersley also views something richer than pluralism in European IEP:

I have argued that to the extent to which states...operate in a Kantian or post-Westphalian culture of anarchy...the possibilities for the creation of more innovative multilateral regimes for environmental protection are greatly enhanced. We have seen this in the European Union, most graphically with the Aarhus Convention, which effectively creates transboundary environmental justice rights (2004: 250-251).

In this crucial passage, Eckersley claims that it is possible to identify states deliberately converging within anarchy. Formally unrestrained in a world lacking Leviathan, states actively seek to mitigate the risks of anarchy by converging on issues of shared concern. It is no coincidence that Eckersley cites environmental protection as a cardinal example of such convergence. It is striking that *The Green State*, an exposition of how green injustice demands a new, responsible sovereignty, locates Aarhus at the core of its Kantian claims. Ward also sees a green hue in the more cosmopolitan dimension of IEP:

The Kantian view is that IGOs, economic interdependence and democracy form a mutually supportive triangle that promotes peace. The network of IGOs facilitates deterrence of bad behaviour, mediation...sharing of information and the generation of norms and trust...Global environmental issues challenge ideas about sovereignty by emphasizing interconnectedness (2006: 154).

Conclusion

This chapter sought to acquaint the reader with the ES, international society and its two ideal types, pluralism and solidarism. The risk is that such theory appears too abstract. Chapter 3 reveals that the ES has practical purchase for investigators seeking to assess tangible research objects; operationalises this framework; and outlines the research design.

3 Research Design

Operationalising Pluralism and Solidarism

The last chapter outlined the pluralist and solidarist ideal types of international society. Hereafter, each analytical chapter assesses Aarhus against these ideal types, to elicit the degree of pluralism and solidarism evident in the Convention.¹² Aarhus is a test for the degree to which IEP is being, and can be, cosmopolitanised. It is also a test for the extent to which sovereignty remains a predominant force in IEP. This thesis follows Weinert, topically applying pluralism and solidarism “as micro judgements about the nature of commitment to, and ethical possibility within, particular issues” (2011: 35). Such topical application “encourages consideration of how solidarist commitments have been, and may be, absorbed into a state-based international society, and how pluralist or more instrumental commitments have been, or may come to be, relaxed in favour of more solidarist aspirations” (Ibid: 39). In sum, the pluralist and solidarist ideal types are heuristic devices, which aid understanding of the ‘real world’.¹³ They are benchmarks, affording sufficient abstraction from research objects to enable a balanced, theoretically cogent assessment. Ideal types reveal “nothing about the real world, but...throw into relief its deviations from themselves” (Watkins 1952: 25).

¹² Keene (2009) encourages the ideal-typical use of international society; Weinert (2011) proposes the ideal-typical application of pluralism and solidarism against palpable research objects.

¹³ For Dunne, pluralism and solidarism are “benchmarks which enable an evaluation of how much ‘society’ is present in the inter-state order” (2010: 144).

Following the contemporary ES methodological corpus¹⁴, the project operationalised the ideal types in one key research question and five auxiliaries. The overall question asks: What contribution has the Aarhus Convention made to the normative progress of post-Cold War European IEP? This is a deliberately open question, retaining ample space for gauging the degree to which (a) ‘thin’ pluralism and ‘thick’ solidarism surface in Aarhus, and (b) post-Cold War European IEP is susceptible or resistant to being cosmopolitanised. The five auxiliaries were worded in two formats: the former for documentary analysis, the latter for interviews. The former ask:

- 1 What is the degree of harmony/discord between Aarhus’ rationales and realities?
- 2 Is Aarhus a ‘typical’ MEA? Does it surpass the limits of a ‘typical’ MEA?
- 3 How effective is the green transparency regime that Aarhus has conceived?
- 4 What is the extent of Aarhus’ involvement in democratisation?
- 5 How effective is the compliance mechanism? Are Aarhus’ norms enforced?

The latter ask:

- 1 How would you rate each pillar from 1 to 3, in order of importance? Why?
- 2 What are Aarhus’ greatest achievements? How can Aarhus be improved?
- 3 How well is Aarhus working as an environmental regime?
- 4 To what degree does Aarhus democratise states and decisionmaking?
- 5 How effective is the Compliance Committee? Is compliance seen as a tedious duty or a positive opportunity? Have attitudes and policies changed since Aarhus’ signature in 1998?

¹⁴ See Bain (2009). Navari follows him, noting that “the research question will self-consciously arise out of contemporary issues such as human rights” (2014: 208). Put simply, international society can be operationalised to the extent that pluralism and solidarism emit identifiable and assessable (but not measurable) qualities. However, the research question will inevitably be guided by the research object.

It is useful to explain the rationales for operationalising pluralism and solidarism in these questions. The first question was designed because the hypothesis, lodged at the project's inception, stated that Aarhus is a pioneer of cosmopolitan democracy in post-Cold War European IEP. First readings of the Convention (UNECE 1998) and implementation guide (UNECE 2000) revealed some ambitious claims and aspirations¹⁵, some of which seemed 'too good to be true'. One instance is Kofi Annan's Foreword to the Implementation Guide, deeming Aarhus "a giant step forward in the development of international law in this field" and "the most ambitious venture in the area of environmental democracy so far undertaken" (UNECE 2000: v). This claim, surfacing early in the thesis, led to the question of whether Aarhus' rationales are always reflected in reality. Mason's (2010) critique, also surfacing during initial research, convinced the researcher that further investigation into potential discrepancies between Aarhus' (solidarist) rationales and (possibly pluralist) realities was warranted. Documentary analysis aside, a key way to elicit such discrepancies, and assess whether Aarhus was working, was by interviewing stakeholders and gauging their views of, and engagement with, Aarhus' procedural trinity. The intention was not to aggregate their 'scores' and quantify their perceptions. Rather, the question was deliberately broad and difficult. It sought to make interviewees ponder Aarhus' merits and drawbacks.

The second question was designed to take pluralist international and solidarist cosmopolitan harm conventions into consideration. Pluralist societies codify international harm conventions "designed to prevent harm in relations between states" (Linklater and

¹⁵ The claims and aspirations are made in reference to Aarhus' procedural trinity, which is analysed in Chapters 5, 6 and 7.

Suganami 2006: 179). Under pluralism, the state is sufferer and saviour. Progress materialises in the prevention and reduction of harm committed and received by states. A solidarist society is more ambitious, seeking to “defend the right of all human beings to be free from...unnecessary harm” (Ibid: 205). By asking if Aarhus is a ‘typical’ MEA, the project seeks evidence to indicate whether Aarhus is a conventional international environmental harm convention, symbolising “the art of the possible” (O’Neill 2009: 101), “fraught with difficulties, and conflicts of national interests, values and priorities” (Ibid: 71). By asking whether Aarhus surpasses the limits of a typical¹⁶ MEA, the project seeks evidence to indicate Aarhus’ functioning as a cosmopolitan harm convention, aiming to “extend the bounds of those with whom we are connected, against whom we might claim rights and to whom we owe obligations within the moral community” (Elliott 2006: 350). Such a harm convention would bind humans “as an ecological community of fate” (Ibid: 359) and would regard them, irrespective of their citizenship, nationality or domicile, as the referents for concern. This distinction between ‘thin’ international and ‘thick’ cosmopolitan harm conventions was operationalised according to achievements, weaknesses and possible improvements because initial research, before formulation of the hypothesis, indicated that Aarhus’ key alleged feature was its human- rather than state-oriented environmental provisions.

The third question was devised in acknowledgement of solidarist notions of transformative, ethically ambitious, and dialogic regimes. If pluralists “highlight the dangers of overreach” in multilateralism, claiming that “the ‘reality’ of international law lies in the extent to which it reflects the reasonably immediate self-interest of states” (Hurrell 2007: 289),

¹⁶ Cosmopolitan environmental harm conventions are deemed untypical because “it is open to question whether there is much more than fragmentary evidence that such [cosmopolitan] principles have become customary international law” (Elliott 2006: 353).

solidarists depart the “state consent super-norm” (Ibid: 290) and envisage a cosmopolitan international society, where state-citizen dialogue increases domestic and international legitimacy.¹⁷ From a lay perspective, if Aarhus is failing to work in practice, it is unlikely that it will become a transformative regime that draws states and citizens closer in a post-Westphalian dialogue. Equally, this question was designed such that if Aarhus was alleged to be working well, interviewees would have ample scope to discuss Aarhus’ regime potential, and discuss any transformative scope.

The fourth question was operationalised taking into consideration the internationalisation of democracy. For Hurrell:

The greatly increased normative ambition of international society is nowhere more visible than in the field of human rights and democracy – in the idea that the relationship between ruler and ruled...should be a subject of legitimate international concern; that the ill treatment of citizens should trigger international action; and that the external legitimacy of a state should depend increasingly on how domestic societies are ordered (2007: 143).

Pluralists would shun forced democratisation, sanctify international diversity, reinforce the need to avoid ethical homogenisation, and stress the value of non-intervention. Solidarists would advocate democratisation, the global propagation of human rights norms, and intervention where fundamental rights have been grossly and unequivocally violated. For present purposes, intervention can be ‘soft’ inasmuch as the order of domestic societies, for which Hurrell is concerned above, can be modified by external instrumentalities such as MEAs, compliance committees, capacity-building initiatives, incentives and sanctions. If

¹⁷ See Payne and Samhat (2004), who are concerned for dialogue-oriented multilateralism and its capacity to foster post-Westphalian international affairs.

evidence suggests that Parties have been democratised as a result of the Convention – irrespective of the side of the Cold War divide on which they were situated – this may indicate the presence of (a) solidarist norm enforcement and (b) democracy becoming “far more deeply embedded within international society” (Hurrell 2007:151), or at least in those states participating in post-Cold War European IEP.

The fifth question was devised to accommodate the norm enforcement factor. A strong compliance mechanism, with the capacity to ‘police’ compliance with multilateral norms inside sovereign jurisdictions, indicates the presence of solidarist norm enforcement. Further, by asking interviewees whether they perceived a sense of positive engagement with, or reluctant acquiescence in, the Convention, and whether attitudes and policies have changed since Aarhus’ signature, it is possible to identify the presence or absence of solidarist norm enforcement and ‘soft’ intervention.

Why the English School?

It would appear incongruous that “in Britain, at least, the English School has once more become the dominant theoretical voice” of IR (Dunne 2010: 136). After all, it has allegedly evinced “methodological quietism” (Spegele 2005: 97) and “neglect of the scientific... search for laws of action (or contingent generalizations) about world politics” (Keohane 1992: 1113). For Finnemore, “simply figuring out what its methods *are* is a challenge. There is remarkably little discussion of...methods anywhere” (2001: 509; emphasis added). Jones called for the ES’ disbandment, noting that though “given to philosophical allusion, their own philosophical position is not distinguished by its scope and completeness. Rarely

do they even show a *taste* for close...analysis...and their work...is consequently marred by imprecision” (1981: 1; emphasis added).

This project used an ES approach because it sought to assess a palpable research object for its communitarian and cosmopolitan potential; it was concerned for gauging the prospects of cosmopolitanising IEP; it was interested in axiology, or the values motivating the human practitioners of international affairs; and it was keen to use classical interpretivism in a ‘real world’ investigation. The aforementioned criticisms of the ES might seem telling, but they have been refuted by the ES champions. Wilson (1989), for instance, engaged Jones and his rival, Grader (1988), ending a debate whose case for closing the ES can “be largely disregarded” (Buzan 2001: 471).¹⁸ Wilson identifies four unifying features of the ES in dismissing the call for closure and cementing the case that it deserves to be recognised as its own discrete school of thought in IR (1989: 55-56):

- 1 The ES observes a degree of international order in international relations.
- 2 IR occurs in a normative framework in which rules are followed to preserve order.
- 3 Utopian schemes for transforming the society of states are rejected.
- 4 Strict scientific behaviourism is rejected; interpretive understanding is advocated.

The ES has great usefulness for applied qualitative IR. By focusing on axiology (Keene 2009: 110), the values motivating IR practitioners, and by *also* avoiding entanglement¹⁹ in

¹⁸ See Dunne (1998) for an excellent intellectual history of the ES. Buzan charges Jones’ call to close the ES as “quaint” and “simply wrong” (2001: 471).

¹⁹ Constructivist entanglement is mentioned to reiterate the distinction between the ethico-normative ES and linguistically-oriented constructivism. For Navari: “The attention to declarations of intent, expressed in speech, brings the ES into a...relationship with discourse...and ...‘speech acts’. We should observe, however, that the ES...probes language in its *ordinary* sense, without those structural distinctions considered necessary by such...theorists as Gadamer. In the ES,

the linguistic and social construction of those values, researchers can reflect on whether and why states institutionalise certain values. For Hurrell, the most prominent student of Bull, whose classical approach (1966) is epistemologically interpretivist, the ES rejects claims

...that the international system can be viewed solely...as a decentralised, anarchic structure in which...undifferentiated states vary only according to the distribution of power. Central to the 'system' is a historically created, and evolving, structure of common understandings, rules, norms and mutual expectations (2007: 16-17).

Those 'common understandings' pertain, here, to green transparency²⁰ and democracy. 'Thin' pluralism and 'thick' solidarism were assessed against a new, under-investigated research object. The aim was to establish the strength of the 'mutual expectations' of green human rights in post-Cold War European IEP. Following Hurrell, the task was to gauge the extent to which green transparency norms were "embedded in the institutions and practices of international society" (Ibid: 17). The project assessed "human relations...in terms of normative standards" (Jackson 2009: 21). Rather than using a structural realist 'outside-in' approach, studying the forces pushing states along inescapable and often acrimonious paths, the project took an ES 'inside-out' approach, addressing the values motivating practitioners to take the decisions they choose (Buzan 2001: 487). Attention was paid to

language is expressive of meaning, and its analysis is directed towards recovering intent (2014: 214; emphasis added).

²⁰ Florini deems transparency a pioneering norm in post-Cold War international relations: "The long-dominant norm of the sovereign right of states to maintain secrecy... has gradually ceded ground to a new norm of transparency, under which states are obligated to provide vast quantities of information" (1996: 381).

the reasons why practitioners would wish to confer stricter environmental rights on citizens, knowing that sovereign privileges, such as those to impede information disclosure and judicial access, would be curtailed under the Aarhus regime. Put simply, the thesis sought the sentiment that moved state and non-state practitioners to think and act the way they did.

Bias would have emerged, had only statespersons' axiologies been studied. As discussed below, a representative sample of informants was used, to obtain perspectives from an array of actors. Following ES methodological work, the benefit of such perspectives can only be gained by achieving intimacy with norms and values, and eliciting the "conscious engagement"²¹ of, and between, practitioners (Navari 2009c: 55). Such engagement surfaces "in the form of expressive utterance or in the form of practices. In either case, the requirement for this...evidence keeps the analyst not only outside the reign of positivism, but opposed to non-subjective approaches" (Ibid: 55). Through interpretivism, and 'getting to the heart' of the values motivating practitioners, the ES is a form of international applied ethics (Jackson 1996: 184). It values IR as a forum for ethico-normative dialogue.²²

Single Intensive Case Study

A single intensive case study was used. Case studies are vital devices, "open to the use of theory or conceptual categories that guide the research and analysis of data" (Meyer 2001:

²¹ Conscious engagement echoes Jackson's (2000) account of ES research as an observation of codes of conduct, fostered multilaterally between statespersons. Such codes contain normative content that is "constitutive of international order" (Navari 2014: 207). Such content comprises "publicly endorsed...norms" occupying the international agenda, and influencing shared ideas of the international common good (Ibid: 207).

²² For the ES as a forum for ethical deliberation, see Blanchard 2011; Epp 1998; Rosenberg 1994; Jackson 2000, 2009; and Shapcott 1994.

331). Without a theoretical framework, one “is in severe danger of providing description without meaning” (Ibid: 331). The risk of a single case is that its implications may not be generalizable. Even if Aarhus was wholly cosmopolitan, even if it had rendered Europe entirely solidarist, this may not have a bearing on broader IEP. But this thesis is not the only one to have focused on a strikingly small-*n* sample. Meyer, who has influenced this work, “deliberately chose to provide a deeper and richer look...allowing the reader to make judgements about...applicability rather than making a case for generalizability” (Ibid: 348). The benefits of using one case outweigh the costs. First, Aarhus is a Cinderella MEA. Its advocates laud it for its cosmopolitan potential, propensity to revolutionise decisionmaking, and democratising impact. But despite such praise, this project is aware of no doctorate that studies Aarhus primarily for its IEP ramifications, let alone as a test for the degree to which IEP is susceptible to cosmopolitanisation.²³ Second, and consequently, only a single case can afford the depth required in such an assessment. Third, space, time and finance preclude an examination of, and fieldwork for, more than one MEA. Had multiple MEAs²⁴ been assessed on an equal basis to Aarhus, analytical depth would have suffered. Fourth, Aarhus was sampled specifically due to its pluralist and solidarist value. Initial research, prior to the hypothesis’ formulation, indicated that Aarhus would be a rich testbed for assessing the presence of pluralism and solidarism in one corner of IEP. Indeed, sampling is crucial. The goal was to choose a research object that was “likely to replicate or extend” the theoretical framework (Ibid: 333). Sampling seeks “information richness and selects...cases purposefully rather than randomly” (Ibid: 333). Creation of the research

²³ The cosmopolitanisation of IEP itself eludes the scholarly literature, granting this doctorate a claim to originality.

²⁴ The Espoo Convention features primarily in Chapter 8, on regime effectiveness. Chapter 4, on Aarhus’ origins and purpose, situates the Convention within a suite of international environmental and human rights regimes.

design drew upon Meyer: “The case study approach...combines data collection methods such as archives, interviews, questionnaires and observations” (Ibid: 336). The aim was to triangulate and corroborate all findings and conjectures using multiple sources. The researcher asked informants to verify claims elicited from documents, and offer their views on the interviewer’s own claims. Human claims were, wherever possible, cross-referenced against documentary evidence.

Tripartite Methodology

According to Navari, ES investigators

...spend time in archives getting their hands dirty. They become immersed in diplomatic records, memoirs and newspapers. They spend time in international institutions, listening to what international civil servants say and to what they think they are doing. They reflect on the meaning of diplomatic action and on the precepts behind that action. The notion of... ‘practice’ serves...to point the researcher in the direction of the practitioner (2014: 213).

In this spirit, a tripartite methodology was used, involving *extensive* documentary analysis, *intensive* interviews, and participant observation, enabling vast amounts of data to be procured. The project followed Betsill and Corell, who

...call on researchers to gather data from a variety of sources, including primary and secondary...documents and interviews with NGOs, state delegates and UN observers. The aim is to pick triangulation sources that

have different biases [and] strengths, so that they...complement each other
...To control for...bias, researchers should...interview NGOs and national
delegates participating in the negotiations...Researchers can also obtain
evidence...by participating in and observing...negotiations (2001: 80 -81).

This project coded its documentary sources and interview transcripts according to Reed's²⁵ method of "reading texts with specific questions in mind, coding passages using keywords as answers emerge, and using the keywords to sort quotes into themes from which theory can be derived" (2008: 2422).

Documentary Analysis

This involved reading, coding and analysing an array of documents. Primary ones included official literature;²⁶ secondary ones included a diverse corpus of scholarship.²⁷ This interdisciplinary approach enabled all-source data collection, broadening the knowledge utilised. An advantage was that apparently disparate texts were coordinated to enable a holistic, systematic evaluation of the Convention.

²⁵ Reed is an environmental public participation scholar. This project coded all documentary sources and transcripts with different coloured highlighters, according to the five auxiliaries noted above.

²⁶ Official documents primarily emerged from the UN, EU, governments, and judicial institutions.

²⁷ Scholarly texts were drawn from IR, politics, IEP, law, governance, sociology, geography, philosophy and environmental science.

Semi-Structured Interviews²⁸

These were deliberately semi-structured. Whilst the auxiliaries guided them, ample time was left for digression from, and elaboration of, informants' claims. Effort was made to avoid questionnaire-style interviewing. Adhering to ES methodology, the project sought an intimacy with Aarhus that would not have been attainable through numbers, ticks or 'yes/no/maybe' ternaries. Following the ES, the project sought to 'know' its research object via human engagement. The project was exploratory; King recommends that exploratory projects have "a low degree of structure imposed on the interviewer [and] a preponderance of open questions" (in Meyer 2001: 338). Stricter interviews, or surveys, would have precluded an intimate appreciation of the axiology that the ES seeks. The interviews were beneficial, creating a wealth of new knowledge that eluded the public. Unpublished, personal opinions were gathered. Human evidence contributed to each chapter. But opinions are biased; they are not viewed here as objective. They *did* add value to this thesis, albeit when they had been corroborated. Pursuant to ethics regulations, anonymity is safeguarded. But one can remark that effort was taken to interview a diversity of high, medium and low level stakeholders from a variety of backgrounds. This echoes Meyer's claim that the benefit "of using multiple informants is that the validity of information provided by one informant can be checked against that provided by other informants. Moreover, the validity of the data...can be enhanced by resolving the discrepancies among different informants' reports" (Ibid: 337). Another sampling factor was informants' knowledge: experts, whether lay or professional, were sought to ensure data validity. As Table 1 shows, the sample included 10 low, 6 medium and 5 high level

²⁸ Interview participants are cited as P1, P2 etc. 'P' denotes 'Participant'. To preserve anonymity, the thesis refers to single participants as 'they'.

informants. It featured 5 legal professionals, 5 civil servants, 1 diplomat, 2 green campaigners, 2 international civil servants, 3 academics, and 3 NGO officials. 6 informants were from non-Western transition regimes; 15 were from advanced democracies. This is because recruiting informants from the former was more difficult than recruiting them from the latter.

In 2013, an attempt was made to visit Lviv, Ukraine, to interview environmentalists and lawyers present at the conferences attended by the researcher. The aim was to investigate compliance problems. This was cancelled due to costs and security concerns.

Speaker	Occupation	Seniority
1	Lawyer	Low
2	Civil Servant	Low
3	Solicitor	Medium
4	Diplomat	High
5	Civil Servant	Medium
6	Civil Servant	High
7	Environmental Campaigner	Low
8	International Civil Servant	High
9	Civil Servant	High
10	Lecturer	Low
11	Civil Servant	Low
12	NGO Manager	Medium
13	Solicitor	Medium
14	Environmentalist with experience of Aarhus capacity-building and compliance	Low
15	NGO Trainee	Low
16	[Omitted]	[Omitted]
17	International Civil Servant	Low
18	Researcher	Low
19	Lawyer	Medium
20	Researcher	Low
21	Barrister	Medium

Table 1

Interview sample with all protected material omitted.

Embedded Participant Observation²⁹

This is an ES signature. Manning, a “doyen of the ES” (Navari 2014: 210) and an early advocate of IR as an independent discipline, was influenced by his LSE anthropologist colleagues Malinowski and Radcliffe-Brown. Both pioneered participant observation as a method. Manning used it in his work on international society, seeing as his task “the initial mapping of the structure, the norms and the mores of an international society...evinced not only in the comings and goings of statespersons...but also in the increasing development of international laws and institutions” (Ibid: 210). For this project, embedded observation was valuable. Following Meyer, four techniques were available. First, covert surveillance would have involved “concealing any intention to observe the setting” (Meyer 2001: 340). This was impossible and undesirable. The researcher had to obtain clearance to enter the Palais des Nations; his intentions were unambiguous. Second, the researcher could have been a “complete observer, who merely stands back and eavesdrops” (Ibid: 340). This was also undesirable and impossible, given the formal registration process, and my seat at the table with fellow researchers. Third, the investigator could have been an “observer-as-participant, who maintains only superficial contact with the people being studied” (Ibid: 340). Given the diplomatic environment, and my overt wish to interview stakeholders during my trip, this technique would have been impractical. The researcher thus chose the fourth option, serving as a “participant-as-observer, who forms relationships and participates in activities, but makes no secret of his...intentions” (Ibid: 340). This was a productive decision that created a wealth of new evidence for use here.

²⁹ Evidence collected during embedded fieldwork is cited as F1, F2 etc. ‘F’ denotes ‘Fieldwork Notes’; the number denotes the page number of the investigator’s fieldwork notes.

Embedded observation thus entailed participating in two conferences at the Palais des Nations: the Sixth Meeting of the Task Force on Access to Justice under the Aarhus Convention (17-18 June 2013) and the Sixteenth Meeting of the Working Group of the Parties to the Aarhus Convention (19-21 June 2013). The fieldwork generated 22 pages of typed primary research, and imbued the project with a human, value-oriented quality that the ES encourages. Put simply, the investigator learned by ‘doing’ Aarhus, and followed Bryman’s suggestion that the participant-observer

...immerses him- or herself in a group...observing behaviour, listening to what is said in conversations both between others and with the fieldworker, and asking questions...Typically, participant observers and ethnographers gather further data through interviews and the collection of documents...(2001: 291).

Conclusion

This chapter operationalised the pluralist and solidarist ideal types in one overall question and five auxiliaries. It then acknowledged and refuted methodological critiques of the ES, turning to axiology, intimacy with the ‘conscious engagement’ of practitioners, and modern notions of applied international ethics to justify its use of the present design. Thereafter, it discussed the case study method and the tripartite methodology. Next, the thesis provides a suite of analytical chapters that put this design into practice.

4 Aarhus: Origins and Purpose

...the Aarhus Convention is the first Multinational Environmental Agreement...which specifically links human rights with environmental protection.

Pedersen (2008: 93).

This chapter considers Aarhus' origins and purpose in two sections. The first claims that Aarhus' origins and purpose demonstrate the emergence of an international civilising process³⁰ in post-Cold War Europe, entailing (a) states' internalisation³¹ of environmental consciousness and (b) the growing socialisation of, and mutual identification between, states on both sides of the Cold War divide. The second positions Aarhus in the wider corpus of international environmental and human rights regimes.

³⁰ Elias conceived the civilizing process, writing that as "more and more people must attune their conduct to that of others, the web of actions must be organised more...strictly and accurately" (1982: 232). The human must "regulate his conduct in an increasingly differentiated, more even and...stable manner" by virtue of humanity's "complex and extensive" interdependence (Ibid: 233). The motto of the process is that "things that were once permitted are now forbidden" (Caxton in Linklater 2011c: 9). Affinities exist between this and the harmonisation of state relations in international societies. Standards of civilisation dictate "the conditions which must be satisfied before political actors can enjoy membership of international society" (Linklater and Suganami 2006: 211). A democratic civilising process is presently underway. Demands for stronger civil society, and for individuals to have international legal personality, mean "it is no longer eccentric...to argue that global decisions should have the consent of everyone who may be harmed...however much the gulf between principle and practice persists" (Ibid: 212). Linklater notes the presence of an Eliasian civilising process in ES writing, evident in the "order that exists even in the condition of anarchy, and which is underpinned by various international institutions and practices that reflect the pressures on societies to become attuned to each other's interests and more restrained in their dealings with each other" (Linklater 2011c: 12).

³¹ Internalisation of green consciousness occurs when green "values are so...integrated [into state laws, policies and decisionmaking practices] that they become as 'natural' as more conventional economic terms actors presently apply whenever they make decisions as producers or consumers" (Lundqvist in Eckersley 2004: 245).

Civilisation and Socialisation

On 25 June 1998, Aarhus was signed at the Fourth Ministerial Conference of the Environment for Europe³² initiative, Aarhus, Denmark. It ended two years of negotiations; the conference was attended by 52 of the 55 UNECE member states and over 70 IGOs and NGOs (Zaharchenko 2009: 11). Initially, 35 states signed Aarhus, plus the European Community. Aarhus wholly entered into force on 30 October 2001, by virtue of the sixteenth ratification instrument being deposited at the UN. The Convention contains a Preamble, 22 articles and two annexes. Article 1 offers Aarhus' overall objective; Article 2 defines the Convention's key terms; Article 3 offers general provisions on procedural rights; Articles 4 to 9 codify the procedural trinity; and Articles 10 to 22 offer the administrative provisions. Whilst Annex I enumerates the activities regulated pursuant to Article 6(1)a, on public participation, Annex II covers arbitration. It must be stressed that the Aarhus practitioner community regards the Convention as setting minimum rather than maximum standards for Parties, such that its provisions are "a floor, not a ceiling" (UNECE 2014b: online).

Aarhus' origins are rooted in the propagation of post-Cold War democracy. Green transparency was "one of the political demands of civil society opposition groups in the former socialist countries, preceding and indeed precipitating the fall of the Berlin Wall" (Sand 2003: 491). It should thus be little surprise that numerous Parties³³ are former

³² The Environment for Europe process was established by UNECE in 1991.

³³ Reference is being made to Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Montenegro, Poland, Moldova, Romania, Serbia, Slovakia, Slovenia, Tajikistan, Macedonia, Turkmenistan and Ukraine (UNTC 2014a).

socialist countries. It should also be of little surprise that NGOs were heavily involved in Aarhus' pre-signature negotiations. According to an NGO senior manager, early on in the negotiations, "we were saying it's not enough to have guidelines. NGOs want more. So we were very happy that we finally got...to work further on a legal framework" (P12). Drafting of the Convention was conducted by NGO delegates as well as their diplomatic counterparts. During the negotiations, the Convention NGO coalition – the precursor of the European Eco-Forum, convened "a group of people...really working on the preparation of the Aarhus Convention" (P12).

Aarhus acknowledges, but avoids codifying, a substantive³⁴ right to the environment. Most vital is its trinity³⁵ of procedural rights to environmental information access, participation and justice, themselves the core of green proceduralism (Douglas-Scott 1996). This trinity resulted in Aarhus being extolled for "heralding a more responsive relationship between people and governments" (Mason 2010: 11). For Pedersen, Aarhus is "a significant step in elevating procedural environmental rights to the level of customary norms in Europe...the Aarhus Convention, through its procedural rights, has the potential to facilitate the same

³⁴ A substantive right is to something palpable. A procedural right is to *have something done* correctly. In the trinity, citizens are entitled to extensive data disclosure, participatory opportunities and redress mechanisms in relation to environmental decisionmaking. If these are safeguarded, and decisionmaking procedures executed properly, the substantive right to a healthy environment will more likely be achieved. This is because citizens are theoretically better equipped to influence decisions. For this reason, Article 1 aims to "*contribute to*" environmental protection and not achieve it *per se* (UNECE 1998: 3; emphasis added).

³⁵ Practitioners assign great value to the trinity. Each pillar exists in harmony with the other. One informant portrayed the pillars as "Greek pillars: pull one down and they all collapse, the whole building collapses" (P7). Another deemed them symbiotic: "you need to...be informed if you want...participation. If you are denied information, if you cannot properly participate...you should have some kind of place where you can complain about it" (P12). Pillar one, information access, is *primus inter pares*. It is the first criterion for 'good governance', a springboard from which to participate and seek justice. Participation comes second as it (a) results from acting on facts and (b) stimulates pursuit of justice. The third pillar is an *outcome* of its forerunners and a safeguard for them. This coheres with Senecah's 'Trinity of Voice': access, standing and influence (2004: 23).

outcome as a substantive right in terms of assisting citizens enforcing and pursuing environmental norms” (2008: 92).

Legally entrenching³⁶ Principle 10 of the Rio Declaration³⁷ (Morgera 2005: 138), Aarhus is cosmopolitan in (a) conferring rights on humans *per se*³⁸ including future generations, vulnerable to harm over which they have no control; and (b) imposing duties on states to protect those humans.³⁹ This makes Aarhus a “valuable laboratory” for assessing the scope

³⁶ One participant concluded that “Principle 10 is just one paragraph of non-binding text, which we’ve expanded with a lot of detail, and definitely made legally binding” (P16).

³⁷ Principle 10 states: “Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have...access to information concerning the environment...held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decisionmaking processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided” (UNEP 1992b: online).

³⁸ Article 3(9) states that “the public shall have access to information...the possibility to participate ...and...access to justice in environmental matters without discrimination as to citizenship, nationality or domicile” (UNECE 1998: 5). The Preamble notes that “every person has the right to live in an environment adequate to his or her health and wellbeing, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations” (Ibid: 2). This beckons complex governance between states and non-state actors, noting “the importance of the respective roles that individual citizens, nongovernmental organisations and the private sector can play in environmental protection” (Ibid: 2). It is also crucial that Aarhus discerns the public from the public concerned. Article 2(4) defines the public as “one or more natural or legal persons and...their associations, organisations or groups” (Ibid: 4). Article 2(5) defines the public concerned as “the public affected or likely to be affected by, or having an interest in, the environmental decision-making...nongovernmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest” (Ibid: 4). It should be noted that the public concerned must have an interest – and this need not be a *sufficient* interest – in the decision in question.

³⁹ The Preamble notes that “citizens may need assistance in order to exercise their rights” (Ibid: 2). It states that “public authorities hold environmental information in the public interest” and notes that “judicial mechanisms should be accessible to the public, including organisations, so that its legitimate interests are protected and the law is enforced” (Ibid: 3). Article 1 imposes duties on states to protect humans: “In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and wellbeing, each Party shall guarantee the rights of access to information, public participation in decisionmaking, and access to justice in environmental matters” (Ibid: 3). Article 3(2) obliges Parties “to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation...and in seeking access to justice in environmental matters” (Ibid: 5). Notably democratically, Article 3(4) obliges Parties to “provide for appropriate recognition of and support to associations, organisations or groups promoting environmental

for cosmopolitanising IEP (Ibid: 147), not least as it echoes “the cosmopolitan corollary to the doctrine of international environmental justice [that] would start with recognition of global justice, and the rights of all persons and the duties of capable persons, and includes conscious efforts to actualise global justice in agreements and the national and multinational institutions of states” (Harris 2011a: 185). With this in mind, it is important that Aarhus adheres to the legal doctrine of positive obligation, the “legal obligation of a state to take certain action...as required by the state to fulfil its legal obligations under human rights norms” (Condé 1999: 110). As becomes evident in the chapters assessing the procedural trinity, Aarhus is very much a work of positive obligation, imposing duties on states to actively safeguard citizens, democratically and environmentally.

Pedersen notes the importance of this conferral of human-oriented duties on states, writing that Aarhus’ use of “citizens’ rights and reciprocal obligations in the contracting states...resembles traditional human rights instruments more than any previously seen MEA. The Aarhus Convention is...the first MEA that exclusively focuses on the obligations of states towards their own citizens” (2008: 93). Mason claims that Aarhus has the capacity to “shape legislation and policies across Europe: its key significance for widening transnational accountability for environmental harm turns on the explicit recognition of participatory rights in environmental governance” (2005: 35). Aarhus has, in the UNECE region at least, turned non-binding ‘soft law’ into ‘hard law’, whose norms are

protection” (Ibid: 5). It is worth noting that, citing Article 2, Parties are contracting state members; public authorities are governments at all levels; natural or legal persons performing public roles; entities providing any public service in relation to the environment; or the institutions of any regional economic integration organisation (Ibid: 4). The EU exemplifies the latter.

enforceable. It is the first ‘hard law’ to multilaterally codify green democracy norms, and assign green rights to humans, who can seek redress if their rights are violated.⁴⁰

With the foregoing in mind, this chapter views in Aarhus’ origins and purpose evidence of an international civilising process in post-Cold War Europe, entailing (a) states’ increasing internalisation of green consciousness and (b) the growing socialisation of, and mutual identification between, states on both sides of the former Cold War divide. In reference to the internalisation of other-oriented ethics, recall Linklater:

The rise of the universal culture of human rights was evidence that the civilizing process had made some impression on world politics, and had become linked with the emergence of global action to free people from violent and non-violent harm...The emergence of the human rights culture demonstrated that a degree of emotional identification with other people, irrespective of their citizenship and nationality, had made some impression on the world of states (2011b: 1190).

In reference to internalisation, Aarhus echoes the idea of an increasingly ‘civil’ society of states. Recalling⁴¹ the civilising process’ motto as ‘things that were once permitted are now forbidden’, one notes that for the Preamble, “adequate protection of the environment is essential to human wellbeing and the enjoyment of basic human rights, including the right to life itself” (UNECE 1998: 2). The Preamble heeds “the desirability of transparency in all

⁴⁰ Buzan offers a superb description of soft/hard law: “How soft or hard any particular arrangement is depends on a combination of how binding its terms are on the participants, how precise the terms of the agreement are in terms of prescriptions and proscriptions on behaviour, and how much power is delegated by the signatories to institutions or third parties to monitor, manage and enforce the terms” (2004: 156).

⁴¹ See note 27 above.

branches of government” (Ibid: 2), indicating the presence of a *democratic* standard of civilisation, a democratic condition that must be satisfied for states to be deemed legitimate in a society here delineated by UNECE’s borders.

Further, the need for states’ internalisation of green concern is noted in the preambular observation of “the importance of fully *integrating* environmental considerations in governmental decisionmaking” (Ibid: 3; emphasis added). The need for internalisation is evident in Annex I, disclosing an extensive list of environmental activities subject to the Convention’s provisions (Ibid: 19-23). With the above motto in mind, Annex I discloses activities that were once permitted, but are now heavily regulated, rather than forbidden.⁴² This indicates the presence of a green civilising process at work in the UNECE region. Subscribing to the ES premise that “order depends on internalised constraints, including a common desire to place restraints on violence, a shared willingness not to exploit the weaknesses of others, [and] an ability to empathise with others’ fears and interests” (Linklater 2004: 7), Annex I discloses exactly what should be subject to green internalised constraints, so as to reduce public vulnerabilities and attune states (and industry) to public fears.

In reference to socialisation⁴³, Aarhus codifies “rights that directly contradict the fundamental secrecy of the former Soviet Union” (Zaharchenko and Goldenman 2004:

⁴² Annex I includes, inter alia, construction of oil refineries and nuclear processing plants; metals production and processing; establishment of ceramics plants; construction of chemical and biological facilities; waste management; construction of long-distance railways and airports with runways of 2100m length or more; motorway construction; construction of waterways holding vessels heavier than 1350 tons; petroleum extraction; construction of facilities for rearing poultry or pigs; quarrying; and processing raw animal materials for food (UNECE 1998: 19-23).

⁴³ East-West socialisation was deliberate. For Mason: “The geopolitical context of regime change and independence in former Warsaw Pact countries gave an unprecedented opportunity for the

229). It thus appears incongruous, on first scrutiny, that so many of Aarhus' ratifying Parties were once Eastern Bloc members. To address this, it is worth noting that multilateralism has been deemed a site of diplomatic socialisation (Freyburg 2012: 1). Diplomacy between democracies and non-democracies has been said to constitute "a site for the socialisation of individuals into democratic norms" (Ibid: 3). Exposure of practitioners to democratic and human rights norms, and cross-pollination of 'good governance' practices, helps 'export' democracy. O'Neill regards former socialist states' participation in green multilateralism as associated with "processes of political transition and state-building, as political elites look for ways of stabilizing and strengthening political institutions in...former Soviet republics, particularly as a condition for receiving foreign aid" (2009: 130). Compagnon et al would agree, arguing that transition democracies sign MEAs given the "need to foster their existence on the international scene and from their expectations of attracting more Western funding through a kind of permanent if implicit bargaining" (2012: 240).

However, it would be too cynical – and inaccurate – to attribute socialisation to financial prudence alone. Legitimacy and community merit attention. Recall Buzan's portrayal of socialisation as a solidarist signature:

Convergence in the sense necessary for solidarism has to involve a deeper ...'we-feeling'. It has to involve a package of values...associated not just with belonging to the same civilisation [but]...with a substantial degree of

Commission [UNECE] to set a regional governance agenda that...fused democratic entitlements with environmental protection norms. Between 1990 and 1995, 16 newly independent...states had joined UNECE and, at least symbolically, were keen to embrace democratic values (2010: 12). Pedersen agrees, deeming the "geographical scope of the...Convention and its intentions of furthering environmental protection in former Soviet states [as holding] the potential to spread transparency and openness into other policy areas and thus enhance democratic decisionmaking in those countries" (2008: 99).

convergence in the norms, rules, institutions and goals of the states concerned. Pluralism is abandoned when states not only recognise that they are alike...but see that a significant degree of similarity is valuable, and...reinforce the...legitimacy of their own values by consciously linking with others who are like-minded, building a shared identity with them (2004: 147-148).

Such notions of deliberate socialisation, between states on both sides of the once Cold War divide, were corroborated during fieldwork. An international civil servant cited two reasons why the Eastern European, Caucasus and Central Asian (EECCA) states were so ostensibly eager to join, and apparently eager to participate in, Aarhus (P17). First, legitimacy: Aarhus sets stricter (green democratic) benchmarks that its Parties must attain, to be deemed legitimate in the eyes of their peers and citizenries. By professing to heed and pursue those benchmarks, states attempt to become more legitimate and responsible members of the regional international society of the UNECE region (P17). Second, community: transition democracies were said to benefit from a supportive community of knowledge, expertise and support, where capacity-building, multilateralism, and multi-stakeholder dialogue enable states, citizens and the environment to benefit (P17). A solicitor corroborated this, when asked why Aarhus had courted such close attention from former socialist territories: “I’m sure it’s legitimacy and democracy, because you can say ‘we have these certain minimum standards that we will adhere to, and that people can rely on’. And the rule of law is fundamental to any democracy...And unless you have that, you can’t really say you have a democracy” (P3). A lawyer echoed such legitimacy claims, arguing that EECCA states may “simply want to demonstrate their credentials...to demonstrate they are good citizens on the global stage...It could also be for internal

purposes, to satisfy their own population by showing they are doing this; to secure their own political status within the country, for instance if, as a result of civil war, they need to gain the support of society” (P19).

Moreover, a civil servant likened Aarhus membership to EU membership. It would appear that such indulgence in Aarhus’ green transparency and democracy norms is a rite of passage to a more environmentally conscious, democratic, and ultimately Western regional international society (P9). The participant argued that multilateral support is a key benefit for EECCA entrants, who can benefit from green governance best practices being shared *between*, rather than forced *upon*, states. The accent, during this interview, was on mutual socialisation between states in a diplomatic project that surpassed the boundaries of green governance (P9). This resonates with Zaharchenko’s observation that Aarhus “reflected a longing of the newly independent states to find a new voice, a new identity, and a new future that would be welcomed among Western democracies” (2009: 29). Indeed, one researcher, in an interview, said that socialisation into the Western diplomatic community was a key motive for joining Aarhus: “I’d want to be in the club, not outside it ...it’s another international arena where countries can build allies...It’s another international platform where you can do your implementing and networking. It’s another card in your pack” (P18).

Legitimacy and community aside, emphasis should also be placed on the value of certain human individuals who brokered this socialisation. One lawyer offered a revelation:

My understanding is that one of the reasons they [the EECCA states] were enthusiastic about joining was that a particular individual...persuaded them.

And that was Svetlana Kravchenko...One of the reasons can simply be that

you have a charismatic or dogmatic individual who can persuade states to become involved (P19).

This was a striking remark that left the researcher for this thesis most surprised. The late Kravchenko's work aided this project. But prior to the interview, the thesis would not have entertained the idea that Kravchenko, a prominent figure in Aarhus from inception on, would have directly influenced EECCA ratification. This echoes O'Neill's finding that

...things would indeed be different without the particular framing, communications, or negotiating abilities of these [charismatic] individuals ... [T]he reasons why some individuals entered into environmental activism and politics, how they reached the positions they did (and, in many cases, the price that they paid), and the impact they have had on global environmental governance and institutions provide instructive reading (2009: 68).

None of this socialisation would have been attainable without the collapse of the USSR and the end of bipolarity. The seeds of change were sown beforehand, though. For Krämer,

Even at the height of the Cold War...Western countries and...Warsaw Pact countries...identified the environment as a policy sector where – despite ideological differences – exchange of information, common agreements and joint confidence-building...could be undertaken...It was thus predictable that after the Berlin Wall had come down and East-West discussions started ...the concepts of access to environmental information and participation... were priority candidates for joint undertakings (2012c: 97).

Between 16 October and 3 November 1989, the Conference on Security and Cooperation in Europe held a Meeting on the Protection of the Environment in Sofia (CSCE 1990). UNECE participated, as did the USSR, UK and USA (Ibid: 2-3). This demonstrates, albeit in one limited instance, that East and West met before the fall of the Berlin Wall to discuss the environment, a relatively benign and functional issue on which they could converge to a limited degree. But the conference was punctuated by allegations that campaigners from the NGO *Ecoglasnost* were being beaten outside the venue (UNECE 2000: 23). The conference responded with a proposal agreed by all participants but Romania.⁴⁴ It declared that the participant states respected the

...right of individuals, groups and organizations...to express freely their views, to associate with others, to peacefully assemble...[and] obtain, publish and distribute information...without legal and administrative impediments...These individuals, groups and organizations have the right to participate in public debates on environmental issues, as well as to establish and maintain direct and independent contacts at national and international level (CSCE 1990: 3).

As the Cold War was ending, East and West agreed on the shared norms of environmental data disclosure and public participation. The conference stressed “the importance of the contribution of persons and organizations dedicated to the protection and improvement of the environment” and its “willingness to promote greater public awareness and understanding of environmental issues” (Ibid: 3). One month later, the Berlin Wall fell.

⁴⁴ Even Bulgaria, the host whose officials were allegedly beating the protestors, sanctioned the proposal (UNECE 2000: 23).

This rapid collapse of bipolarity, literal and figurative, set the context in which greater demands for green transparency and democracy could be articulated:

After the fall of the Berlin Wall...and the breakup of the Soviet Union in 1991, Western European countries were determined to bring democracy from the West to the East...In addition to promoting electoral democracy, they worked to promote the concept of public participation in government decisionmaking, focusing specifically on environmental decisionmaking (Kravchenko 2007: 6).

In March 1991, the first Soviet-American green NGO conference occurred in Moscow. Yanitsky notes that priorities for cooperation were identified, including joint data collection and dissemination, “technologies of bottom-up influence on decisionmakers”, public awareness, and promotion of public participation “in court cases involving compensation for damage caused to the natural environment” (2012:927). Democratisation faced, and sought to overcome, post-bipolarity inertia very early. The environment was a benign conduit for propagating democracy in (former) Soviet space. A decade afterwards, when Aarhus entered into force, 11 of 17 ratifying Parties were former socialist countries. Zaharchenko writes: “All Soviet successor states except Russia and Uzbekistan decided to abide” by the Convention (2009: 1). Even Russia’s diplomats “were genuinely intending to sign the Convention...but at the last minute received instructions from the Kremlin not to” (Ibid: 52). The Russian Ministry of Defence and Federal Security Service were “strongly opposed” to Aarhus (Ibid: 25). At the time of the pre-ratification negotiations, a Northern Fleet captain was charged with treason for co-authoring a report on nuclear safety issues in

the Russian Northern Fleet area; this would have influenced the Kremlin's instructions not to sign the Convention (Ibid: 25).⁴⁵

Russia and Uzbekistan aside, Aarhus socialised the practitioners of non-Western European countries into an international society delineated by UNECE's borders. It provided tools for 'good governance', not only in terms of an MEA, and a framework for transposing it into domestic law, but also in terms of capacity-building and a forum for dialogue between Parties. For Zaharchenko, the EECCA states viewed Aarhus "as an admission ticket to the club of civilized democratic societies...The example of Baltic, Central European and East European countries that had just recently been socialist but were now entering the European Union...and harmonising their legislation with EU requirements further contributed to the Convention's appeal" (Ibid: 1).

International Environmental and Human Rights Law

Aarhus will now be situated in the broader corpus of international and environmental human rights law. Regarding the environment, the Universal Declaration of Human Rights (UDHR 1948: online) is a good starting point. Whilst it does not entrench environmental rights, Article 28 states: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized" (Ibid). This is crucial given the logic of indivisibility, positing that "all human rights together form a whole that cannot be divided into subsets" and that "a state cannot choose to respect certain human rights...and to exclude others" (Condé 1999: 67). All human rights are

⁴⁵ The Security Council of the Russian Federation concluded that signature of the Convention would "create a threat to Russian national security" as "the scope of environmental information defined by the Convention could provide cover for spying" (Zaharchenko 2009: 25).

interconnected; each must be safeguarded for the other to be attained. Environmental rights derive from Article 28, as without a clean environment, underpinning Buzan's earlier "liveable international order" (2004: 145), the UDHR's fundamental rights would be unachievable.⁴⁶ The UN Commission on Human Rights (UNCHR) deemed this socio-international order as embracing "the environmental concerns of this day and age" (UNCHR 1994: 9).⁴⁷ The Universal Declaration of Human Rights (UDHR) (UN 1948) shares affinities with the EU Charter of Fundamental Rights (EU 2000), adopted two years after Aarhus. Environmental rights derive⁴⁸ from this, but a substantive⁴⁹ environmental duty (if not right) is also assigned. Precedent for codifying a substantive environmental right was set by the African Charter on Human and Peoples' Rights⁵⁰ and the Additional Protocol to the Organization of American States' Convention on Human Rights.⁵¹

⁴⁶ See the right to "life, liberty and the security of person" (Article 3); to not being "subjected to arbitrary interference with his privacy, family" or "home" (Article 12); to "work, to free choice of employment" and to "just and favourable conditions of work" (Article 23); to "rest and leisure" (Article 24); and to "a standard of living adequate for the health and wellbeing of himself and of his family" (Article 25) (UDHR 1948: online). If the environment, in which these rights are sought, prohibits their provision and receipt, their benefit and use will be hindered.

⁴⁷ The UNCHR cites Galicki's claim that the right to life "is the most important among all human rights" and "one which is, most of all, connected to and dependent on proper protection of the human environment" (in UNCHR 1994: 37). The right to life "may be directly and dangerously threatened by detrimental environmental measures" (Ibid: 37).

⁴⁸ Reference is made to Article 2: "Everyone has the right to life" and Article 7: "Everyone has the right to respect for his or her private and family life, home and communications" (EU 2000: 9).

⁴⁹ See Article 37: "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development" (Ibid: 17).

⁵⁰ See Article 24: "All peoples shall have the right to a general satisfactory environment favourable to their development" (ACHPR 1981: online).

⁵¹ See Article 11(1): "Everyone shall have the right to live in a healthy environment and to have access to basic public services" (OAS 1988: online).

Regarding democratic rights, Aarhus coheres with the UDHR⁵² and International Covenant on Civil and Political Rights (UN 1966).⁵³ It also coheres with provisions for the European Court of Human Rights (ECtHR), codified in the European Convention on Human Rights (ECHR), adopted by the Council of Europe in 1950. Article 34 of the ECHR is crucial, ensuring that the ECtHR “may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation” by a Party to the ECHR (ECtHR 1950: 20). This sets a democratic precedent followed by Aarhus’ compliance mechanism.

Environmental rights can be derived from the ECHR (Birnie et al 2009: 300). Whilst the ECHR does not explicitly cite the environment, the ECtHR has interpreted the ECHR in environmental contexts, ruling that positive obligation mandates states to protect humans from green harm. A vivid demonstration of this is *Lopez Ostra v Spain* (Pedersen 2008: 85). There, the complainant and her family lived in Lorca, a Spanish town with numerous leather facilities. Lodging the claim in 1990, the complainant alleged a contravention of the right to respect for home, family and private life, pursuant to Article 8 of the ECHR. The family lived twelve metres from a leather plant, which had opened in 1988 without the relevant permits. The complainant’s daughter suffered serious illness. The plant operated

⁵² Article 19 safeguards “freedom to opinion and expression” and the right to “receive and impart information and ideas through any media and regardless of frontiers”. Article 20 safeguards the right to “peaceful assembly and association”. Article 21(1) holds the right to “take part in the government of his country, directly or through freely chosen representatives”. Article 27(1) confers the right to “participate in the cultural life of the community” (UDHR 1948: online).

⁵³ See Article 6(1): “Every human being has the inherent right to life”; Article 9(1): “Everyone has the right to liberty and security of person”; Article 19: “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers”; Article 21: “The right of peaceful assembly shall be recognised”; Article 22: “Everyone shall have the right to freedom of association with others”; and Article 25: “Every citizen shall have the right and the opportunity...to take part in the conduct of public affairs, directly or through freely chosen representatives” (UN 1966: online).

without requisite permits; pollution was so bad that local residents were evacuated for three months before the case (Ibid: 85). The European Court of Human Rights (ECtHR) ruled that “severe environmental pollution may affect individuals’ wellbeing and prevent them from enjoying their homes in such a way as to affect their private and family life adversely” (in Ibid: 85). The court found that Spanish authorities failed to achieve a fair compromise between Lorca’s economic development and citizens’ rights to have their home, family and private lives respected. A contravention of Article 8 was found. *Lopez Ostra v Spain* demonstrates the means by which environmental rights can be derived from other freedoms, without substantive environmental rights being enshrined.

Elsewhere, the much overlooked General Assembly Resolution 2542 (XXIV), Declaration on Social Progress and Development (UNGA 1969), laid Aarhus’ normative roots *three decades* before the Convention’s signature, and is a crucial ‘soft law’ precedent.⁵⁴ A year beforehand, General Assembly Resolution 2398 (XXIII) (UNGA 1968) was signed. Titled ‘Problems of the Human Environment’, it evinced embryonic environmental concerns that were beginning to pervade the normative fabric of international society.⁵⁵

⁵⁴ See Article 5: “Social progress and development require the full utilization of human resources, including...(a) The encouragement of creative initiative under conditions of enlightened public opinion; (b) the dissemination of national and international information for the purpose of making individuals aware of changes...in society; (c) The active participation of all elements of society, individually or through associations, in defining and...achieving the common goals of development with full respect for the fundamental freedoms embodied in the [UDHR] (UNGA 1969: 3). Article 15(a) calls for the “adoption of measures, to ensure the effective participation...of all the elements of society in the preparation and execution of national plans and programmes of economic and social development” (Ibid: 6). Article 25(a) calls for the “establishment of legal and administrative measures for the protection and improvement of the human environment, at both national and international level” (Ibid: 9).

⁵⁵ It laments “the continuing and accelerating impairment of the quality of the human environment”, foreseeing the “effects on the condition of man, his physical, mental and social wellbeing, his dignity and his enjoyment of basic human rights” (UNGA 1968: 2). This Resolution called for an international conference on the human environment, which would occur in Stockholm in 1972.

Four years later, the 1972 Stockholm Declaration offered a ‘soft law’ precedent, creating the “first nexus between human rights and the environment” (Pedersen 2008: 77). Bearing a resemblance to the UDHR and Covenant, it elicits symbiosis between basic freedoms and an environment conducive to their provision and receipt.⁵⁶ The UN Commission on Human Rights (UNCHR) praised Stockholm for its synthesis of human rights and the need for an accordingly conducive environment:

The relationships established by the Stockholm Declaration between the environment, development, satisfactory living conditions, dignity, wellbeing and individual rights, including the right to life, constitute recognition of the right to a healthy and decent environment, which is inextricably linked...to universally recognised fundamental human rights (1994: 8).

A decade after Stockholm, UN General Assembly Resolution 37/7, World Charter for Nature, was adopted. This was one of the first declarations to recognise rights to environmental information access, participation and justice. A number of its normative claims resurfaced in Aarhus.⁵⁷ Moreover, 1987 witnessed UNEP’s adoption of its *Goals*

⁵⁶ See Article 1: “Both aspects of man's environment, the natural and manmade, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself” (UNEP 1972: online). Principle 1 of the Declaration states: “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations” (Ibid).

⁵⁷ See Principle 11(b): “Activities which are likely to pose a significant risk to nature shall be preceded by an exhaustive examination; their proponents shall demonstrate that expected benefits outweigh potential damage”; Principle 11(c): “Activities which may disturb nature shall be preceded by assessment of their consequences, and environmental impact studies...shall be conducted sufficiently in advance, and if they are to be undertaken, such activities shall be planned and carried out so as to minimize potential adverse effects”; Principle 15: “Knowledge of nature shall be broadly disseminated by all possible means”; Principle 16: “All planning shall...be disclosed to the public by appropriate means in time to permit effective consultation and participation; Principle 21(a): states, alongside “public authorities, international organizations, individuals, groups and corporations, shall...co-operate in the task of conserving nature through common activities and other relevant actions, including information exchange and consultations”; and Principle 23: “All persons...shall have the opportunity to participate, individually or with others, in the formulation of

and Principles on Environmental Impact Assessment. This framework sets a crucial participatory precedent that would be heeded by Aarhus just over a decade later.⁵⁸ In the same year, the Brundtland Report, *Our Common Future*, was published by the World Commission on Environment and Development. This coined the contemporary idea of sustainable development, which “meets the needs of the present without compromising the ability of future generations to meet their own needs” (WCED 1987: 43). Two years later, the World Health Organization adopted the European Charter on Environment and Health (1989). Its provisions presage Aarhus’ entitlements, offering another ‘soft’ precedent to guide the Convention’s normative trajectory in the 1990s.⁵⁹ In the same year, General Assembly Resolution 44/25, Convention on the Rights of the Child (UNGA 1989), was passed. As with its counterparts in this corpus of international law, the Resolution finds symbiosis between inviolable freedoms and the need for an environment conducive to their conferral and enjoyment. Whilst a substantive environmental right is recognised, the non-binding nature of such Resolutions renders the Convention simply a ‘soft’ aspiration.⁶⁰

Two years later, the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo) was signed (UNECE 1991). This should be deemed Aarhus’ sister treaty,

decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation” (UNGA 1982: online).

⁵⁸ See Principle 7: “Before a decision is made on an activity, government agencies, members of the public, experts in relevant disciplines and interested groups should be allowed appropriate opportunity to comment on the EIA” (UNEP 1987: 6).

⁵⁹ The Charter states that every individual is entitled to “an environment conducive to the highest attainable level of health and wellbeing; information and consultation on the state of the environment, and on plans, decisions and activities likely to affect both the environment and health; and participation in the decision-making process” (WHO 1989: 2).

⁶⁰ See Article 24: “Parties recognize the right of the child to the enjoyment of the highest attainable standard of health” by, inter alia, “taking into consideration the dangers and risks of environmental pollution” (UNGA 1989: 8).

for it was concluded, and is managed, under the auspices of UNECE. Both share important synergies (P4; see also Ebbesson 2011).⁶¹ Espoo is a ‘transboundary Aarhus’, enjoining source countries, responsible for transboundary harm, to treat affected states’ citizens just as Aarhus Parties would treat their own. Indeed, Aarhus was adopted seven years after Espoo, and ‘internalises’ the green transparency and democracy norms that Espoo propagated at the international level.

In 1992, the Rio Earth Summit⁶² was held. Two of its key outcomes, the Rio Declaration (UNEP 1992b) and Agenda 21 (UNEP 1992a), had great relevance for Aarhus’ inception; one recalls earlier claims that Aarhus is the strongest codification of Rio’s aspirations to date. Aarhus is, without doubt, a Rio Principle 10⁶³ treaty, by virtue of its procedural trinity, whose roots are grounded in Principle 10. But the prevalence of Principle 10 should not eclipse Aarhus’ equally vital affinity with Rio Principle 27, the deeply democratic demand that states and citizens “cooperate in *good faith*” and “a *spirit of partnership*” when fulfilling Rio’s provisions and developing international environmental law (UNEP 1992b; emphasis added). The spirit of the law, of state-citizen dialogue and partnership,

⁶¹ See Article 2(6): “The Party of origin [of transboundary environmental harm] shall provide...an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures regarding proposed activities and shall ensure that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin (UNECE 1991: 3); see also Article 3(8): “The concerned Parties shall ensure that the public of the affected Party in the areas likely to be affected be informed of, and be provided with possibilities for making comments or objections on, the proposed activity, and for the transmittal of these comments or objections to the competent authority of the Party of origin (Ibid: 5).

⁶² This was formally entitled the UN Conference on Environment and Development.

⁶³ See note 31 above.

becomes the letter of the law in Aarhus. Agenda 21 is another of the procedural trinity's normative roots.⁶⁴

A year after Rio, two significant UNECE treaties were signed in Helsinki: the Conventions on the (a) Protection and Use of Transboundary Watercourses and International Lakes (UNECE 1992a) and (b) Transboundary Effects of Industrial Accidents (UNECE 1992b). The former is significant for Aarhus' information disclosure provisions,⁶⁵ the latter sets clear precedent for the codification of the procedural trinity six years later.⁶⁶

The World Conference on Human Rights, held in 1993, adopted the Vienna Declaration, concerned for participation: "Democracy, development and respect for human rights...are interdependent and mutually reinforcing. Democracy is based on the freely expressed will

⁶⁴ Chapter 1(3) demands the "broadest public participation" and involvement of NGOs in green decisionmaking. Chapter 8(18) seeks creation of "judicial and administrative procedures for legal redress...of actions affecting environment and development that may be unlawful". They "should provide access to individuals, groups and organizations with a recognized legal interest. Chapter 10(10) demands creation of "procedures, programmes, projects and services that...encourage the active participation of those affected in the decisionmaking and implementation process". Chapter 15(6)f asks states to collect, analyse and disseminate "relevant and reliable" data "in a timely manner and in a form suitable for decisionmaking at all levels, with the full support and participation of local and indigenous people and their communities". Chapter 40(1) states: "In sustainable development, everyone is a user and provider of information", the need for which "arises at all levels, from that of senior decision makers...to the grassroots and individual levels (UNEP 1992a: online).

⁶⁵ See Article 16(1): "Riparian Parties shall ensure that information on the conditions of transboundary waters, measures taken or planned to be taken to prevent, control and reduce transboundary impact, and the effectiveness of those measures, is made available to the public (UNECE 1992a: 10).

⁶⁶ See Article 9(1): "The Parties shall ensure that adequate information is given to the public in the areas capable of being affected by an industrial accident arising out of a hazardous activity" (UNECE 1992b: 5). Article 9(2), like Espoo's Article 2(6), aims to internationally achieve that which Aarhus seeks in domestic decisionmaking: "The Party of origin shall...give the public in the areas...affected an opportunity to participate in relevant procedures with the aim of making known its views and concerns on prevention and preparedness measures, and shall ensure that the opportunity given to the public of the affected Party is equivalent to that given to the public of the Party of origin (Ibid: 5).

of the people to determine their own political, economic, social and cultural systems, and their full participation in all aspects of their lives” (in UNCHR 1994: 17). Recently, UNESCO adopted the Brisbane Declaration on Freedom of Information in 2010. This is a milestone ‘soft law’ assigning information rights that echo Aarhus’ first pillar.⁶⁷ Indeed, the UNCHR deems information a vital tool, concluding that “the concept of democratic government as stated in Article 21 of the [UDHR] becomes meaningless unless individuals and groups have access to relevant information” (UNCHR 1994: 44).

A year after the World Conference, the UNCHR (1994) published a report on the synergies between human rights and the environment. It appears, at points, to offer a prelude to Aarhus’ procedural trinity, codified four years later. This is an apt quote with which to begin drawing conclusions from this chapter. With some urgency, the UNCHR concludes:

People must be able to prevent environmental harm...[P]eople have the right to receive notice of and...participate in any significant decisionmaking regarding the environment...To prevent damage or...provide relief if damage has already been done, people must...have the right to seek effective remedy in courts, tribunals or other forums for violations, including violations arising from a failure to allow effective participation (Ibid: 46).

⁶⁷ It stipulates that “the right to information is critical for informed decisionmaking, for participation in democratic life, for monitoring...public actions, and for enhancing transparency and accountability, and represents a powerful tool to fight corruption” (UNESCO 2010: online). It calls on UNESCO members to “enact legislation guaranteeing the right to information in accordance with the internationally-recognized principle of maximum disclosure” (Ibid).

Conclusion

First, Aarhus demonstrates the presence of, and contributes to, a *greener* European regional international society. Aarhus Parties have been socialised into a society distinguished by its green concerns. Aarhus evinces, in the UNECE region, a sense of mutual identification not only between states, but also between states and citizens. Parties are more attuned to human environmental vulnerabilities. This echoes Falkner's claim that

...the rise of global environmentalism has had a lasting, and potentially transformative, impact on international relations...[I]nternational society has slowly but steadily been 'greened'...Environmental ideas and norms have gradually been woven into the normative fabric of the states system... [such that] the rise of global environmental responsibility deserves to be recognized as a major example of the normative expansion of international society (2012: 503).

Further, a civilising process is evident in European international society. The motto of the civilising process is that 'things that were once permitted are now forbidden'. Aarhus is slightly more reformist, in that 'things that were once permitted are now heavily regulated'. Such regulation as Annex I attunes states (alongside public authorities and industry) to environmental vulnerabilities. Annex I heeds that humans cannot enjoy basic freedoms in an environment that inhibits their provision and receipt. Aarhus Parties internalise these regulations, displaying a 'changed social mentality' that expresses regret at environmental harm and resultant human suffering. If the civilising process encompasses "changing conceptions of shame" and an increasing "need for...self-restraint as more and

more humans become entangled in lengthening webs of interconnectedness” (Linklater and Mennell 2010: 384-385), Aarhus’ origins demonstrate a willingness, in the UNECE area, to deliberately limit environmental harm, and also provide citizens with the tools to do so.

Secondly, this greener European international society therefore embodies a stricter, greener, more democratic standard of civilisation. The substance of this standard is the suite of procedural (and to a limited degree, substantive) rights outlined above. These rights constitute that which must be internalised by states, for them to be deemed legitimate in the eyes of their counterparts and citizenries. By complying with this stricter standard, Parties constellate in a greener international society, echoing Linklater’s claim that “Over the last three decades, the ecological challenge has been the spur for innovative arguments for reshaping moral and political horizons so that social systems exercise greater influence over global processes that largely escape their control” (2009: 489).

Thirdly, the presence of such a stricter standard of civilisation is evidence of solidarism in Aarhus’ origins and purpose. The Convention, and some of its forbears and counterparts, are concerned with assigning rights to humans *qua* humans. The above analysis witnessed duties accepted by states to protect humans, as well as future generations, unable to rectify harm done today. This is cosmopolitan in its acknowledgement that “the dignity of individuals and groups forms a vital part of our concept of justice” (Honneth in Elliott 2006: 350) and its compatibility with the Kantian categorical imperative to treat people as ends and not means (Ibid: 350). The study of Aarhus’ origins thus indicates the emergence of a cosmopolitan environmental harm convention, a “road leading away from pluralism and its attendant moral deficits...[which] asks that care be exercised in an attempt to avoid mental and bodily harm, and...announces an injunction against indifference to the

suffering of others” (Bain 2014: 166). Furthermore, Aarhus’ conversion of ‘soft’ human-oriented aspirations into ‘hard’ law is solidarist in quality, since it provides scope for other-oriented ethics to be enforced and ‘policed’ in order that human justice can be achieved in a society of states. Aarhus, from this angle, is a conduit for good international citizenship; it offers the legal ‘teeth’ and ‘bite’ for otherwise blunt, non-binding aspirations.

However, it would be naïve to assert that Aarhus’ origins and purpose demonstrate solidarism alone. Firstly, socialisation is prudent and pragmatic. States benefit from participating in green multilateralism and assigning citizens further privileges, not least because they gain an ‘admission ticket’ into another diplomatic arena in which they can pursue their own interests. Indeed, it was evident earlier that the Russian Federation saw Aarhus as going way ‘beyond the basics’ of ‘thin’ communitarianism, posing a possible threat to its security interests. The principle of state consent remains; if states wish not to participate in multilateral diplomacy, they are under no obligation to. Furthermore, it is significant that a substantive environmental right has made scarce progress in comparison to more benign, bureaucratic procedural rights.⁶⁸ Insufficient consensus between states, and persistent international difference, renders a universally acceptable substantive environmental right unattainable. It is also important that the overwhelming majority of law identified earlier is ‘soft’, non-binding and aspirational. This indicates the residual presence of international diversity and difference, and the relative legal absence of what Hurrell terms a green “cosmopolitan moral consciousness” (2007: 233).

Indeed, it cannot be denied that Aarhus, and its sister MEAs, are *multilateral*. Their rights are bestowed upon citizens, reinforcing state supremacy in international society. Without

⁶⁸ Particular attention is paid to substantive weaknesses in Chapter 7.

state consent, and without the presence of contracting Parties, there would be no such environmental rights. Sovereignty remains the springboard from which to seek human justice; *international* rather than cosmopolitan law remains the conduit for codifying and enforcing human justice. Finally, the residual presence of pluralism can be seen in a positive light. This chapter identified a tentative, piecemeal cosmopolitanisation of IEP, beginning with aspirational declarations, accelerating with prominent conferences and declarations, and intensifying with legally-binding commitments. World society values, those cosmopolitan ethics that unite unknown others, were placed on the normative fabric of a regional, primarily European, international society. That society is not a 'halfway house' between anarchy and cosmopolis, but a stable and understandably enduring framework that can be enriched by other-oriented, responsible, cosmopolitan ethics.

5 Pillar One: Information Access

...participation is only effective when access to information is freely available to all.

Payne and Samhat (2004: 76)

Access to information is the 'hardest' and most detailed element of the Aarhus Convention.

Holder and Lee (2007: 101)

The Prevention of Imposed Harm

Good reason exists for deeming the first pillar of the Aarhus Convention *primus inter pares*. In the words of one diplomat interviewed, “Everything starts with information” (P4). Without it, “neither public participation in decisionmaking nor the enforcement of environmental regulations through...litigation would be possible” (Rodenhoff 2002: 345). Rodenhoff is not alone in holding the pillar in such esteem.⁶⁹ Indeed, the Riga Declaration, issued at the Third Meeting of the Parties (MoP) to the Convention in 2008, declared:

⁶⁹ For Lee and Abbot, pillar one “is the clearest obligation in the...Convention, and...the necessary starting point for any public involvement in decisions. It also supports any formal or informal enforcement rights held by the public” (2003: 88). During fieldwork, an international civil servant stressed that without information, neither participation nor redress is attainable (P17). A lawyer from a post-Soviet territory told me that even if participation and justice are secured, “you still need the information. Information is the first barrier” (P1).

Public access to information, as well as being a right in itself, is essential for meaningful public participation and access to justice...[T]he right to information leads on the one hand to more transparent, accountable government and on the other to a more informed, environmentally aware public (UNECE 2008c: 3).

Aarhus' information⁷⁰ provisions are passive (Article 4) and active (Article 5). Passively, they enable citizens to request and obtain environmental information held by public authorities.⁷¹ Actively, they oblige authorities to obtain and disseminate it, irrespective of whether requests are filed.⁷² The reasoning is that citizens have (a) the right to *know* what is happening to their environment and (b) the right to *influence* what is happening, by

⁷⁰ Aarhus defines environmental information as information "in written, visual, aural, electronic or any other... form on (a) the state of elements of the environment...; (b) factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting...elements of the environment...; (c) the state of human health and safety, conditions of human life, cultural sites and built structures [that] are or may be affected by the state of the elements [or]...factors" listed (UNECE 1998: 4).

⁷¹ See Article 4(1): "Each Party shall ensure that...public authorities, in response to a request for environmental information, make such information available to the public" (Ibid: 6). It must be disclosed, subject to exemptions covered later, "without an interest having to be stated" and "in the form requested" unless it has another form, or can reasonably be otherwise disclosed (Ibid: 6). According to Article 4(2), information must be provided "as soon as possible and at the latest within one month after the request has been submitted" (Ibid: 6).

⁷² See Article 5(1): "Each Party shall ensure that (a) Public authorities possess and update [relevant] environmental information...; (b) systems are established so that there is an adequate flow of information to public authorities about...activities which may...affect the environment; (c) In the event of any imminent threat to human health or the environment...all information which could enable the public to take measures to prevent or mitigate harm...is disseminated immediately and without delay to members of the public who may be affected" (Ibid: 7). Article 5(4) obliges regular, national data dissemination: "Each Party shall, at regular intervals not exceeding three or four years, publish and disseminate a national report on the state of the environment, including information on the quality of the environment and information on pressures on the environment (Ibid: 8). During embedded fieldwork in Geneva, there was an urgent sense in the conferences that data dissemination, to *all* stakeholders, should be the first, cardinal priority (F1).

preventing and mitigating harm that may incur their own suffering. This logic appreciates that administrative decisions may be

...wrong or erroneous. The best way to reduce such...decisions is to lay open the...assumptions, assessments and findings and...let the civil society that is concerned or affected by the...decision participate...This implies that the public...has the same amount of information...as the deciding administration (Krämer 2012: 103).

Pillar one relinquishes the ‘need to know’ dictum in favour of the ‘right to know’. The latter rests on the claim that citizens are entitled to know of harmful activities, undertaken either by state or non-state actors (Oksanen and Kumpula 2013: 977). It has been said that the right to know exists symbiotically with the right to express oneself (Ibid: 977); pillar one embodies the former, pillar two encompasses the latter.⁷³ Such symbiosis exists as the right to know would be futile if citizens could not comment or act on their knowledge. Indeed, information is the fundamental prerequisite for dialogue in the green public sphere⁷⁴ (Eckersley 2004: 116).

⁷³ The trinity coheres with Oksanen and Kumpula’s idea of the right to know, comprising “first, the right to information; second, the right to pertinent background knowledge; third, capability rights, enabling citizens to obtain “the relevant personal qualities required by democratic citizenship”, and finally the right to participate effectively in public affairs (2013: 981).

⁷⁴ The green public sphere is, for this project, that array of states, authorities, citizens, developers, industry, academics and civil society associations, either responsible for, or interested in the environment and activities altering it. The public sphere is used as a device for conceptualising that space in which state and non-state actors converge on mutually important issues. It is not a palpable site, but “a space for politics [that] means far less the construction of any physical location than it does the creation of a *we* for public discourse” (Torgerson 1999: 157).

In embodying the right to know dictum, Aarhus aims to prevent and reduce imposed harm. Actual harm should be distinguished from imposed harm. The former incurs palpable physical suffering; the latter is

...the denial of choice that comes with a lack of consultation and consent...

The injustice of the harm is aggravated when it is imposed, rather than freely chosen with full knowledge of the facts. Thus a harm is worse than a cost, and a harm that is imposed is worse than one that is freely accepted (Shapcott 2008: 198).

Imposed harm exploits ignorance and is exacerbated when victims lack knowledge of decisions taken in relation to them. It occurs when an entity “withholds morally significant information” such that victims are “kept in ignorance” (Linklater 2011: 99). Aarhus is the first MEA to seek to prevent such imposed harm, but it follows the ethics of Carson’s *Silent Spring*, demanding that “the public must decide whether it wishes to continue on the present road, and it can do so only when in full possession of the facts” (in Oksanen and Kumpula 2013: 977). Pillar one’s logic is that ignorance blinds and mutes citizens, preventing them from influencing decisions that may harm them. This animates not only Aarhus⁷⁵, but other fora.⁷⁶

⁷⁵ The Preamble states that, “to be able to assert this right [to live in an environment adequate to... health and wellbeing] and observe this duty [to protect and improve the environment], citizens must have access to information, be entitled to participate...and have access to justice in environmental matters” (UNECE 1998: 2). The Preamble notes: “improved access to information and...participation...enhance the quality and the implementation of decisions, contribute to public awareness...give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns” (Ibid: 2).

⁷⁶ See UNEP’s Manual on International Environmental Law: “Where environmental information is lacking, the public is hindered from taking...action to stop environmental degradation. The lack of...information...affects public participation...because the public cannot speak out about...degradation...if they are not aware of their rights or their situation” (2006: 86).

In seeking to prevent imposed harm, pillar one aims to enhance public trust in procedures of environmental decisionmaking. One study of Aarhus' UK implementation found that most participants regarded both information accessibility, and provision to affected people, as "essential" (Hartley and Wood 2005: 327). Trust in authorities will decline with public concerns that information access is impeded, or that information provision is less than expeditious, irrespective of whether such shortfalls are through design or neglect. The study found that trust rose if participation was "well-executed which, in turn, depended... on access to information, the provision of this information to the relevant people and some degree of interaction with the stakeholders" (Ibid: 327).

Effective data disclosure enhances trust and confidence in the pursuit of justice. According to the Report of the Working Group on Access to Environmental Justice (the Sullivan Report)⁷⁷, broad disclosure and robust knowledge allows a claimant to

...assess the strength of his position before deciding whether to take the... step of issuing proceedings. The absence of...information...[can] (a) have an inhibiting effect because a prospective claimant cannot justify the risk involved in issuing proceedings without knowing the full picture; or (b) have the opposite effect of proceedings being issued in circumstances where early disclosure would have made clear that the case had no real prospects of success (Working Group on Access to Environmental Justice 2008: 29).

⁷⁷ The Working Group on Access to Environmental Justice was convened under the chairmanship of Mr Justice Sullivan in 2006, to consider issues of access to environmental justice in England and Wales. Its remit was to (a) assess whether current practices hindered access to justice in the context of the Aarhus Convention and (b) provide recommendations that would overcome barriers to environmental justice (Working Group on Access to Environmental Justice 2008: 6).

Trust and confidence accrue with the sense that public accountability⁷⁸ is being enhanced. Information disclosure helps safeguard public accountability as it “can embarrass both polluters and public regulators, contributing to environmental probity” (2007: 101). The corollary is that knowledge is power. By relinquishing the need to know, and embodying the right to know, power is transferred to citizens. Under this logic, knowledge vacuums are power vacuums; where such vacuums exist, imposed harm ensues.⁷⁹ Inevitably, the legitimacy of decisions taken inside power vacuums is “somewhat imperfect” (Oksanen and Kumpula 2013: 981). The foregoing has found evidence of the intention in pillar one to prevent such imposed harm.

Impediments to the Prevention of Imposed Harm

Pillar one is not flawless. First, it is bounded by state consent and administrative reticence. The latter may not be attributable to disdain of transparency *per se*, but rather its costs, in terms of time, finance and effort.⁸⁰ There was a sense, from interviews with P2 and P5, that

⁷⁸ Accountability, for Keohane, comprises (a) standards that accountable actors (here, states and authorities) must meet to retain legitimacy; (b) information with which accountability-holders assess those actors; and (c) redress mechanisms for when the accountable have failed to meet those standards (2011: 101-103). For Biermann and Gupta, accountability has four dimensions (2011: 1857): a normative one; a relational one, “linking those who are held accountable to those who have the right to hold to account” (Ibid: 1857); a decision element, or a “judgement of those actors who may hold other actors accountable about whether the expected standard of behaviour has been met” (Ibid: 1857); and finally a behavioural one, allowing governing actors in a regime to sanction the “deviant behaviour of those held accountable” (Ibid: 1857). For Abels, accountability is only meaningful if it can “go beyond sheer information and...include debate, the possibility of questions by the account-holders...and answers by the accountors...and, finally, judgements on the performance of the accountors...[which] imply the imposition of sanctions – whether formal or informal” (2007: 106).

⁷⁹ Krämer cements this: Aarhus’ advocates “invoke the principles of open society as one of the basics of...democracy. They argue that administrative secrecy is...incompatible with democracy, as it creates different degrees of knowledge and, hence, power. This limits the opportunity for citizens, and...their representatives...to decide in full knowledge of the facts” (2012: 95).

⁸⁰ A civil servant said: “FOIs...are, as a general rule, seen as a nuisance...Whilst there is a reluctance to share information...due to information being commercially or politically sensitive, the

authorities were increasingly bombarded with requests and pressured to release data to citizen ‘customers’ as expeditiously as possible. There was also a sense that citizens are more ardently lodging information requests, having witnessed their use in popular media and news coverage.

Sand observes that “old administrative habits, and especially the entrenched reluctance of civil service departments to conduct their business in the open, are hard to break indeed” (2003: 491). Meanwhile, Krämer observes that “administrations continue to consider that disclosure of information on the environment is and should be the exception, and that administrative confidentiality or secrecy is the rule” (2012: 101). To Fitzmaurice’s dismay (2010: 51), allowances for state discretion enable much data to be exempted from pillar one,⁸¹ although if, pursuant to Article 4(6), publishable data *can* be separated “without prejudice to the confidentiality” of exempted data, it should indeed be disclosed (UNECE 1998: 7). Article 4(4), prohibiting the abuse of exemptions⁸², is welcomed by Holder and Lee, warning that a “blanket approach” to data denial is “beyond the spirit of the Convention” (2007: 104).

right to information is not disputed. The regard for FOIs as a nuisance is... down to a lack of officer time” (P2).

⁸¹ Three conditions, in Article 4(3), permit data denial: authorities may not hold it; requests may be unreasonable/vague; data may concern authorities’ “internal communications”. Article 4(4) offers more conditions for denial. Access can be denied if disclosure endangers (a) confidentiality of authorities’ internal proceedings; (b) state security; (c) an authority’s capacity to conduct criminal or disciplinary enquiries; (d) commercial confidentiality; (e) intellectual property; (f) confidentiality of personal data; (g) confidentiality of third party data; and (h) “the environment to which the information relates, such as the breeding sites of rare species” (UNECE 1998: 6-7).

⁸² Article 4(4) states: “The aforementioned grounds for refusal shall be interpreted in a *restrictive* way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment (Ibid: 7; emphasis added).

Secondly, the very nature of environmental information is an impediment to imposed harm prevention. For citizens to prevent and mitigate environmental harm that may hurt them, they need to be in full knowledge of the facts. Only then can they hold decisionmakers to account; only then can they scrutinise decisions and make reasoned recommendations. But even if citizens access and obtain *all* requisite data, they will be blinded and muted if it is indecipherable. If knowledge is power, and the empowering data is prohibitively complex, superficially empowered citizens will be rendered powerless. Data disclosure alone is insufficient; environmental information products must be produced and ‘packaged’ as accessibly as possible. Research for this thesis indicates that often only an expert elite is capable of using environmental information effectively. This creates a power vacuum such as the one above; the risk is that the right to know is exploited by such a tiny minority that the ‘need to know’ returns in all but name. Further, the risk is that complex data can be repackaged, manipulated and ‘spun’ so that a façade of transparency masks a renewed imposed harm, whereby citizens receive the impression of transparency, but are in fact obtaining doctored misinformation. Research indicates that these are not unsubstantiated

claims, but justifiable findings evidenced in scholarship⁸³ and fieldwork for the present chapter.⁸⁴

Conclusion

Pillar one seeks a civilising influence on Parties, evident in the transition from the *need* to the *right* to know. This exemplifies the cosmopolitan all-affected principle.⁸⁵ Knowledge is power; it empowers humans to alter decisions that may harm them. It does not emancipate

⁸³ For Lee and Abbot, "data may be useful only for experts; explaining data provides opportunities for manipulation and the 'selling' of a project" (2003: 93). Arts et al warn that 'spinning' environmental data may "serve political aims" (2013: 12). For Holder and Lee, data "is never neutral, and the drafting of the non-technical summary [in an environmental proposal]...increases concern that a process of information provision could be manipulated" (2007: 112). Hartley and Wood, in a superb exposé of Aarhus in the UK, found that in three of their studies, public "groups felt obliged to hire experts to help them ...understand the complex material describing the projects" (2005: 330). Whilst most authority representatives in their study regarded consultations as chances for citizens to question experts, many citizens "queried their ability to do this effectively because of their lack of technical and legal knowledge" (Ibid: 332). Hartley and Wood found that "inability to understand the complex technical details...was a major factor preventing the public from...participating effectively" (Ibid: 333). Reed notes that "many stakeholders may not have sufficient expertise to meaningfully engage in what are often highly technical debates" (2008: 2421).

⁸⁴ An NGO manager stressed that "we need...*trustworthy* information...it doesn't make any difference if you get information you can't trust" (P12). A green campaigner lamented the complexity of environmental data, arguing that citizens inevitably overlooked data contradictions, given its inscrutability to non-specialists (P7). And even for experts, deciphering data was said to be time-consuming and sometimes impossible (P7). A researcher was adamant that this was a recurrent problem: "Very technical language is used. Because people can't use the right words, they can't participate...There could be a lot more attention...put into translating some of these documents into more simple language. There's also a very obvious issue that some people don't speak English...and those who do, often speak lay English. So documents may be put out for consultation, but people don't feel they can contribute to the consultation. That's a major problem (P18). Another researcher suggested that green 'spin' is prevalent: "Decisionmaking will *always* be accompanied by consultation and documents will always be produced...the question is, who is paying for...what could either be research, what could either be consultation?... Then the report is produced, and fed into the political cycle. Quite often, politicians will ask these producers...to make amendments and change certain things to move it in a way that is favourable to their position (P20).

⁸⁵ The ancient Roman all-affected principle is summarised in the maxim: "*quod omnes tangit, omnibus tractari et approbari debet*": that which concerns all should be considered and approved by all (Linklater 2007: 32).

per se, but is a tool with which humans can free themselves from imposed harm. Aarhus is, from this angle, theoretically a cosmopolitan harm convention. By mandating passive disclosure *and* proactive knowledge transfer from state to citizen, the pillar sanctifies human autonomy, the capacity for each person to determine their “mode of life” (Miller 2007: 177). If ignorant rather than knowledgeable, citizens cannot ensure that the very basis of human existence, the environment, is conducive to health, and the enjoyment of freedoms.⁸⁶ As such, knowledge is a fundamental *need*, codified as a human right in the pillar. Since rights form the “moral bedrock” of (domestic and solidarist international) society, they should be conceived according to the “essential features of human life. Needs possess...moral urgency...[and constitute] items or conditions that it is necessary for a person to have if she is to avoid being harmed” (Ibid: 180).

In seeking to prevent imposed green harm, pillar one heeds, and offers tools for realising, the eco-democratic claim that “all those potentially affected by ecological risks ought to have some meaningful opportunity to participate...in the determination of policies or decisions that may generate risks” (Eckersley 2004: 243). Whilst it satisfies some of Eckersley’s charter⁸⁷ of green rights and duties, it also echoes cosmopolitan demands that causers of green harm “must be morally and politically answerable to those who suffer the consequences” (Linklater 2006: 123). The pillar achieves this by mandating transparency⁸⁸ in relation to environmental data disclosure. It echoes Harris’ notion of green cosmopolitan

⁸⁶ See Aarhus’ eighth preambular paragraph (UNECE 1998: 2).

⁸⁷ Reference is made to the charter’s first two provisions, for a right to environmental information, and a right to be informed of risk-generating proposals (Eckersley 2004: 243).

⁸⁸ Special reference is made to Payne and Samhat’s finding that “transparency is of greatest relevance...because it not only requires that various actors have access to information...but also that they are able to observe – if not participate in a strict sense – political and decision processes. This is a much more direct and inclusive form of scrutiny that is crucial for assuring public accountability” (2004: 58).

justice meriting “procedural fairness whereby *people* and their interests are part of the process of negotiating” decisions (2011a: 190; emphasis in original). Indeed, Harris cites Aarhus⁸⁹ as a tangible response to Schlosberg’s demand that decisionmakers should “not look for a perfect system...before acting in the already obvious imperfect...system we have, and...bring a form of presence to those regularly left out of the decisionmaking process” (in Ibid: 190).

But it would be naïve to argue that pillar one is revolutionary. At any rate, this would be undesirable and impracticable. Firstly, the all-affected principle “makes sense only when... locals possess...appropriate social and ecological consciousness” (Eckersley 1992: 173). Disclosure will only cosmopolitanise decisionmaking *if citizens use it*. The all-affected principle masks the fact that “most progressive social and environmental legislative changes...have tended to emanate from more cosmopolitan central governments rather than...local decisionmaking bodies” (Ibid: 173). Environmental changes – positive *or* negative – continue to be administered centrally. Although the pillar renders the execution of such changes transparent, and offers enhanced scope for public influence, the chances of citizens using it to *thwart* the institutional inertia of technocratic planning are slim.⁹⁰ Secondly, the right to know relies on state consent. Citizens cannot prise knowledge from authorities; neither should they try to. Thirdly, the indecipherability of data is an apparatus of marginalisation. If data is only exploited by technocrat elites, fluent in its language, democratic deficits may arise, such that the ‘need to know’ returns in all but name. Façades

⁸⁹ Harris writes: “One example of involving people more...can be found in the Aarhus Convention...[which] provides legal remedies to enable citizens to challenge governments’ denial of information and to increase participation by the public in international forums” (2011a: 190).

of transparency may mask the ‘spin’ of information, repackaged and marketed for citizens. This constitutes a renewed imposed harm, whereby disclosure is a cover for manipulation.

But these concerns should not eclipse the pillar’s positive progress. Cosmopolitanisation occurred *within* political orthodoxies. Solidarist ethics enriched the status quo. This is more desirable and practicable than cosmopolitan, or even anarchist, visions of ‘people power’ appropriating knowledge, resources and ultimately sovereignty over decisions. It is wiser to apply the all-affected principle *within* orthodoxies. This affords the chance for (a) states to internalise world society values and (b) a stable and enduring political framework to be rendered more just from within.

6 Pillar Two: Public Participation

Much has been made of the ambition of the Aarhus Convention to increase citizen participation, which has clear cosmopolitan potential.

Mason (2005: 78)

No claim about global democracy can be credible without participatory decisionmaking. For participation to be meaningful and substantive, actors must have access to information and decision processes...Similarly, the value of transparency is realised when actors are able to utilise information and observation to effect outcomes.

Payne and Samhat (2004: 53)

Human Empowerment: Legitimacy and Problem-Solving

In public participation, humans, and their collectivities in civil society⁹¹, seek to influence or alter decisions that may harm them (Reed 2008). Participatory rights enable “individuals

⁹¹ Civil society comprises the myriad associations that humans voluntarily join: “the bonds and allegiances that arise through sustained, voluntary, non-commercial interaction” (Wapner in O’Neill 2009: 58). NGOs act as IEP’s ‘conscience-keepers’ (Yamin 2001), “constantly pushing for wider participation...[and] reminding negotiation organisers and participants of their wider audiences. They also provide a critical connection between local communities and global governance, where the interests of those communities may not be represented by their own governments” (O’Neill 2009: 91-92). NGOs are proficient actors “in the effort to enhance regime transparency, and to publicize policy failures or successes, playing a vital role as ‘whistle-blowers’. By monitoring state behaviour, engaging in public education, and working with the media to publicize results, they have, in many cases, succeeded in changing state behaviour in situations where regime officials

and communities to participate in decisions that affect their lives, including the right to know and the right to review” (Saladin 2003: 57). Research found that Aarhus has robust participatory provisions and that great importance is attached to two specific benefits, regarding (a) legitimacy⁹² and (b) problem-solving. Both empower humans.

Regarding Aarhus’ provisions, one recalls the Lucca Declaration, issued at MoP1 in 2002:

...engagement of the public is vital for creating an environmentally sustainable future. Governments alone cannot solve the major ecological problems of our time. Only through building partnerships *with and within* a well-informed and empowered civil society, within the framework of good governance and respect for human rights, can this challenge be met (UNECE 2002a: 1; emphasis added).

Indeed, the goal of Aarhus’ pillar two provisions was to hone “the quality of decision making through improving the quality or range of values and information upon which decisions were based” (Kirk and Blackstock 2011: 1). This is achieved through embracing and utilising public input.⁹³ For this reason, Aarhus has been deemed “the most detailed and advanced treaty on public participation” (Appelstrand 2002: 282) and most “far-

would have little success (Ibid: 119). Transnational civil society is “that slice of associational life that exists above the individual and below the state, but also across national boundaries” (Wapner in Payne and Samhat 2004: 44).

⁹² The legitimacy approach is deeply normative, espousing the “benefits for democratic society, citizenship and equity” (Reed 2008: 2420).

⁹³ A diplomat told me that dialogue is crucial in the Convention, claiming it shares an affinity with the Lincolnian notion of government of the people, by the people and for the people (P4). An international civil servant expressed a similar sentiment, arguing that “There is no sovereignty without the public” (P17).

reaching international development in public participation to date” (Holder and Lee 2007: 97).

Aarhus safeguards participation in three areas: (a) proposals of specific activities; (b) execution of plans, programmes and policies; and (c) creation of laws and other regulations (UNECE 1998: 11). Whilst participation in the first area is uncontroversial, participation in the latter two “goes well beyond” expectations (Lee and Abbot 2003: 94). Indeed, an NGO manager suggested that the final provision is “left out a bit...at the moment” (P12). This provision, codified in Article 8 (UNECE 1998: 11), is “novel” and may be “a significant political tool in the integration of environmental concerns into other policy areas” (Lee and Abbot 2003: 101).

The Convention acknowledges that states are not, and nor should they be, the sole actors responsible for environmental protection⁹⁴ and enjoins Parties to actively support civil society.⁹⁵ Article 6⁹⁶ offers “the most closely specified form of participation in the Convention” (Lee and Abbott 2003: 99). It is, for Oliver, “the most important” provision of the Convention (2013: 1440), and “envisages ‘real’ participation, with the potential to exert a *genuine* influence on decisions” (Lee and Abbot 2003: 99; emphasis added). The Article

⁹⁴ See thirteenth preambular, valuing “roles that individual citizens, nongovernmental organisations and the private sector can play in environmental protection” (UNECE 1998: 2).

⁹⁵ Article 3(4) enjoins Parties to “provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection” (Ibid: 5).

⁹⁶ See Article 6(2): “The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decisionmaking procedure, and in an *adequate, timely and effective* manner” of proposals upon which decisions will be taken; the nature of possible decisions; the authority responsible for making the decision; and the nature of the participatory procedure (Ibid: 9; emphasis added). See Article 6(7): “Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity” (Ibid: 11).

also demands reasonable timeframes⁹⁷ for procedures, empowering humans to serve as active citizens, and preventing the deliberate hindrance of public involvement. D'Silva and van Calster view timing as particularly crucial "as in many cases, participation...occurs too late...when public influence is limited. Thus timing can be a barrier to participation [as] participants may view the decision being made as a 'foregone conclusion'" (2010: 3).

In reference to legitimacy, participation reduces the chances of "those on the periphery of the decisionmaking context" being marginalised, as citizens "can be included in decisions that affect them and active citizenship can be promoted, with benefits for wider society" (Reed 2008: 2420). Aarhus is a tool for preventing marginalisation in both domestic *and* international circumstances.⁹⁸ Legitimacy accrues because the representativeness and diversity of decisionmaking improves with greater participation. Holder and Lee regard "third party involvement and transparency as a way to keep regulators on the straight and narrow" and thus deem participation a vehicle for "potentially improving outcomes" (2007: 96).

Decisionmakers are susceptible to being literally and figuratively distant from the issues for which they are responsible. Public involvement rectifies this, offering a "transmission"

⁹⁷ See Article 6(3): "public participation procedures shall include reasonable timeframes... allowing sufficient time for informing the public...and for the public to prepare and participate effectively during the environmental decisionmaking" (UNECE 1998:10). Article 6(4) reinforces this: "Each Party shall provide for early public participation, when all options are open and effective public participation can take place" (Ibid: 10).

⁹⁸ A solicitor regarded pillar two as a practical tool for human empowerment: "A colleague of mine was working at the climate negotiations in Copenhagen in 2009, and the NGOs were excluded from the building. They used Aarhus as a mechanism to say 'look, most of you are contracting Parties to the Convention; we have the right to be here. We have the right to take part...you should be giving us access'. There are different ways in which people are using the Convention, that we might not have envisaged (P3). More acutely, a lawyer regarded pillar two, relative to its counterparts in the trinity, as "most important. And that's a legal answer" (P19).

belt between governments and their...citizenry” (Böhmelt et al 2014: 32), which channels public views in such a way that “the results of a decision are substantively ‘better’; more equitable; more environmentally protective; more reflective of local needs; and more reflective of public values” (Fitzmaurice 2010: 51). Participation enables *all* stakeholders to “learn from each other through the development of new relationships, building on existing relationships and transforming adversarial relationships as individuals learn about each other’s trustworthiness and learn to appreciate the legitimacy of each other’s views” (Reed 2008: 2420).

Evidence indicates that citizens contribute more than just anecdotal evidence.⁹⁹ Where this is contributed, a mixture of scientific ‘know-why’ and lay ‘know-how’ ensures decisions’ grounding in both scientific rigour and “the collective experience of generations of observation and practice” (Reed 2008: 2425). Use of local knowledge empowers potential victims of environmental harm, ensuring the legitimacy and equity of procedures, as well as decisions themselves.¹⁰⁰ Research indicates that engaging citizens, and using their

⁹⁹ See Beierle (2002: 746): “the capacity that participants bring...is quite impressive, both in terms of scientific and technical training, and in terms of in-depth knowledge...In addition to bringing their own expertise...stakeholders often access external resources through a variety of methods”. In Beierle’s 239-case review of green participation, 74% of cases identified stakeholders with “a relatively high level of internal capacity and external resources” (Ibid: 746). See Steele: citizens “who are closest to a problem and its effects...derived a greater understanding of that problem than those ordinarily required to resolve it” (2001: 437). See Holder and Lee (2007: 94): “At its simplest, providing the decision maker with information from a wide range of participants increases the information available, allowing access to otherwise dispersed expertise”.

¹⁰⁰ See Gauna (1998: 36): “Environmental regulation cannot proceed while blind to social realities, and social realities cannot be explored...without the assistance of those whose lives are most impacted...[C]ommunity expertise arises not from formal study but from intimacy with social and physical environments...A decisionmaking structure that precludes meaningful participation by community groups cannot hope to achieve systematically equitable environmental protection”.

insights, as early as possible in a procedure is integral to decisions' quality and durability.¹⁰¹

Moreover, it has been pronounced that citizens have a right to participate, irrespective of their views' merits. In *Berkeley v Secretary of State for the Environment and Others*, the ruling demanded that "the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion" (House of Lords 2000: online). For Steele, this ruling emphasises that "the citizen has a right to be involved quite independently of whether the decisionmaker believes that the citizen will be able to enhance the process or add anything of value" (2001: 420). However, it should not be forgotten that even the most ardent advocates of "intensely democratic...decisionmaking recognise the legitimate role of science and technical analysis in answering the 'What will happen?' question" that so often surfaces in environmental planning (Beierle 2002: 741). A sensitive balance must be drawn between scientific 'know-why' and lay 'know-how'.

Participation also contributes to more effective problem-solving. Citizens are a font "of knowledge and values" (Steele 2001: 417). Decisionmakers can "tap the resources of citizen contributions, rather than simply...aim at keeping citizens 'content', or allaying public fears" (Ibid: 418). Böhmelt et al agree, writing that "civil society can help governments... obtain policy-relevant information at low cost, which can be important given the high level of uncertainty and complexity that characterises environmental issues" (2014: 21). This pragmatism manifests itself in practitioner texts such as a UN paper

¹⁰¹ Early engagement "has been frequently cited as essential if participatory processes are to lead to high quality and durable decisions" (Reed 2008: 2422).

obtained in Geneva¹⁰² and an Austrian government manual.¹⁰³ Moreover, fieldwork found that decisionmakers and developers benefit greatly from participatory procedures. An interview with an informant, with professional experience of Aarhus capacity-building and compliance work, vividly demonstrated this. The informant recalled an assignment pertaining to the construction of an industrial facility in a former Soviet state. The speaker was tasked with administering the project's participatory procedure. It was striking for the informant, and for me, that urgent concerns were revealed, which had been overlooked by the developer and authority:

...one of the things that came back from the public...was the concern about AIDS. You're in a reasonably rural area and you are going to have a big influx of construction labour on a huge project...and we had to come up with a plan for sexual health. But you would *never* have thought about that until you actually went out and engaged with the people who were going to have this built in the surrounding area (P14).

The foregoing discussion suggests that pillar two offers robust tools for empowering humans, and reducing their vulnerability to imposed harm. Aarhus' provisions yield legitimacy benefits, and – perhaps more importantly, as this excerpt demonstrates – pragmatic benefits that can protect human lives. Had the above procedure *not* been

¹⁰² See UNEP (2011b: 2): "civil society improves environmental governance by providing the means for organised interests...that might not otherwise be represented...to participate more directly...Civil society...can drive greater transparency...; improve decisionmaking by providing key...information, policy analysis and...perspectives; and accelerate implementation and compliance by acting as watchdogs and whistle blowers (UNEP 2011b: 2).

¹⁰³ See Arbter et al (2007: 5): "When a variety of stakeholders – ordinary citizens, lobbyists, entrepreneurs, politicians, administrators – participate...the number of ideas and...amount of knowledge...increase dramatically. The more people are involved, the more perspectives...are presented and discussed...Involving the general public...can improve both the quality of the decisions...and their acceptance".

conducted in this case, serious risks in terms of human as well as environmental health would certainly have accumulated.

Impediments to Human Empowerment

Participatory 'rights' run the risk of becoming most meaningful for those NGOs and other stakeholders that are well-organised, well-financed and well-informed. The emphasis on democratic efficiency...takes little account of the relations of power and powerlessness which mute local or marginal voices.

Elliott (2006: 361)

It would be naïve to conclude that pillar two is a flawless vehicle for human empowerment and the reduction of imposed harm. The key impediment pertains to democratic deficits in participatory governance. Aarhus places vast emphasis on the *public concerned*.¹⁰⁴ If, in my words, the *concerned public* is the lay community, the often ill-informed, incapable¹⁰⁵ lay citizens who may be directly harmed by decisions, the *public concerned* are those

¹⁰⁴ Article 2(4) defines the public as "one or more natural or legal persons and...their associations, organisations or groups" (UNECE 1998: 4). Article 2(5) defines the public concerned as "the public affected or likely to be affected by, or having an interest in, the environmental decision-making... nongovernmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest" (Ibid: 4).

¹⁰⁵ Whilst this seems a pessimistic portrayal of the lay public, this thesis joins Nadal in noting that "In reality, those suffering environmental injustice often lack the capacity...in terms of time, finance, education and technology to participate meaningfully...in pursuing environmental justice" (2008: 33). For Reed, power inequities are an "important barrier to meaningful engagement. It is necessary to consider how inequalities in age, gender and background can be overcome to enable stakeholders to participate on a level playing field" (2008: 2422).

entities – particularly NGOs¹⁰⁶ – with unequivocal interest in environmental decisionmaking. Work for this chapter found cause for concern that a culture of NGO favouritism, in the Aarhus regime, may marginalise and silence the concerned public, who may not have the resources to enrich participatory governance. It is also questionable whether NGOs represent public interests as effectively as they profess. In sum, this thesis is concerned that a small expert elite yields unduly vast influence on environmental decisionmaking, in the Aarhus regime.

Firstly, research for this chapter observed opacity in the public concerned, particularly the NGO community. It observed a presupposition of NGO superiority and expert elitism in the Aarhus regime. Documentary analysis and fieldwork identified the recurrent question of whether NGOs represent the public good as well as they claim. During embedded work, a UNEP position paper was obtained. It found “a lack of transparency and accountability... *within* many [civil society] groups, lack of timely information and guidance on process and substance of decisions, and unclear or inadequate processes for collective decisionmaking, consultation and representation” (2011b: 5; emphasis in original). Concerns for NGO transparency were so acute that UNEP sought four remedies, summarised here (Ibid: 6):

- 1 Simple procedures to ensure all NGOs can develop common positions.
- 2 A duty that NGO statements are responsible, evidenced and representative.
- 3 A duty that NGO statements reflect dissent and minority views within civil society.
- 4 Transparent procedures for appointing/removing civil society representatives.

¹⁰⁶ In reference to the public concerned, Aarhus’ official implementation guide acknowledges the “integral role that NGOs will play in the implementation of the Convention...[O]nce an NGO meets the [domestic] requirements set, it is a member of the public concerned *for all purposes* under the Convention, and may even be deemed to have a sufficient interest under Article 9, paragraph 2” (UNECE 2000: 40-41).

These remedies illuminate problems regarding the transparency, representativeness and public-orientation of green NGOs in participatory governance. The first implies that certain NGOs are marginalised, to the benefit of better resourced, more audible ones; the second implies that some NGO declarations are poorly evidenced and unrepresentative¹⁰⁷ of civil society and the public good; the third implies the presence of groupthink, and the purging of incompatible opinions from prevalent NGO narratives; the fourth heeds the presence of undemocratic, opaque procedures regarding civil society delegates' tenure. Together, these suggest that the *concerned public*, those lay citizens on whose behalf NGOs profess to work, is at risk of being silenced and marginalised.¹⁰⁸ The risk is that NGO elites 'crowd out' laypersons, who are as entitled as NGOs to participate under Aarhus. Indeed, a recent UNECE report registered the common perception that stakeholder dialogue in Aarhus proceedings remains cardinaly "between the EU and the others (or as one interviewee stated, between the EU and European ECO Forum)" (2013b: 27).¹⁰⁹ As Yamin noted, three

¹⁰⁷ A researcher questioned the representativeness of the public concerned: "The public are represented by these NGOs, these professionalised representatives. And to what extent they truly represent the public, I am unsure. In some of my studies, democratically elected representatives were...not included at all. But the technocrats and NGOs were. Participation has been professionalised, but has also become democratically impairing (P18). Another researcher argued that "the difficulty is in defining who the stakeholders are, who the public is, how they are represented. It's the powerful bodies, even the NGOs, which turn it into a new form of bureaucracy, a new form of lobbying. There is perhaps more continuity...between government, and its old practices, and governance. It's kinda painful in a way" (P20).

¹⁰⁸ Recall Elliott's call to "distinguish between civil society as a cosmopolitan public sphere and civil society as professionalised non-state activism in which those who are the disproportionate victims of environmental harm remain unheard and excluded" (2006: 361). See Holder and Lee's claim that, "participation might actually enhance *exclusion*" (2007: 129). See Spyke's claim that a "preoccupation with national matters is...detrimental to would-be participants from poor communities who face environmental degradation, who are likely to be strapped for funding and greatly in need of the expertise that national groups possess" (1999: 294).

¹⁰⁹ During embedded work, a notable proportion of exchanges occurred between the EU, European Environmental Bureau (EEB) and European Eco-Forum. But representatives of individual states, alongside other delegates, also voiced their views and concerns. The researcher did not regard the events as monopolised by the EU, EEB or Eco-Forum, but rather as notably influenced by them. Dialogue was not stifled. Please note that the EEB is Europe's largest federation of environmental organisations; the European Eco-Forum is a coalition of environmental citizens' organisations operating in the UNECE area, with a strong focus on the Environment for Europe initiative.

years after Aarhus' signature: "The question of who NGOs represent is crucial, yet one that governments, international organisations and NGOs themselves have yet to examine" (2001: 156). Whilst this may seem quite an indictment, it is not alone.¹¹⁰ Moreover, the predominance of the public concerned can exacerbate public apathy. The risk is that laypersons gain false reassurance that NGOs are representing them and pursuing the public good. This creates "a free-rider problem reducing the amount of direct participation by individuals" (Fitzmaurice 2010: 52). Observations of such problems pertaining to apathy and freeriding were not confined to Fitzmaurice.¹¹¹

The presupposition of NGO superiority and expert elitism materialised in Aarhus' official implementation guide, which stated: "NGOs are *the* means to exercise the right of association of any group with a common purpose or common interests" (UNECE 2000: 19;

¹¹⁰ For Holder and Lee, Aarhus "pays little heed to mechanisms by which the more 'ordinary' public might be involved in decisions, which is likely to require much thought and effort in many cases" (2007: 99). Recall Holder and Lee's subsequent suggestion that "Environmental interest groups are not representatives of the 'public', or even the 'public interest'" (2007: 130). For Nadal, "by endorsing...the uncritical assumption that NGO representation is desirable over more direct grassroots participation, the Convention can serve as a tool of disempowerment rather than...empowerment" (2008: 44). Recently, Jönsson wrote that "Existing patterns of civil society involvement in global governance fall far short of the threshold requirements that would have to be fulfilled for global stakeholder democracy to be realised. The opportunities for civil society actors to take part in global policymaking are...unequal, select, circumscribed and shallow...NGOs frequently have weak democratic credentials themselves" (2013: 6). See Dellinger's claim that it is "debatable whether any groups can be said to effectively represent the general public" (2012: 316). See also Spyke's finding that "ironic is the problem caused by public interest groups...[T]he benefits of power redistribution that result from public interest group efforts often inure to those groups rather than the public at large" (1999: 275).

¹¹¹ See Spyke: "Motivating individuals to become involved in environmental matters is a challenge, especially when regulators are confronted with an uninformed or free-riding public" (1999: 295) that contentedly lets NGOs pursue an ostensible public good. A lawyer noted that even procedures that overtly target lay citizens may be impaired, if hampered by apathy or unawareness. Authorities need "the public to be proactive...So again, we have particular groups that are engaging...You would be painting too narrow a picture if you said...the democratic deficit is just down to the fact that there is this focus on NGOs. It's also down to the processes...used to allow *individuals* to engage" (P19). An environmentalist concluded that "within the human collective there's only a small percentage of people who are...motivated and driven to actually *force* change" (P14).

emphasis added). NGOs were not the ‘preferred’ or even ‘best’ means, but rather *the* (only, definitive) means by which to influence environmental decisionmaking. This claim makes no reference to an aggrieved lay citizen. Such a presupposition quarantines the lay public, rendering participation a luxury that only the elite can enjoy. Indeed, one NGO senior manager admitted that “the Aarhus Convention is in the hands of the EEB basically” (P12). Such NGO-‘ownership’ impedes human empowerment and is counter-cosmopolitan, privileging some humans over others. Fieldwork identified evidence of patronage politics, whereby a tiny number of non-state actors undertook unelected, but vital, work pertaining to Aarhus.¹¹² This caused concern that NGOs operated without a mandate. Indeed, one interviewee was asked how they got involved with Aarhus; their response was simply that they had been invited to join a four-person permanent delegation (P21). On this account, unelected, unaccountable patronage politics was used to form a delegation that had a tangible impact on the negotiation outcomes, alongside the final Convention text. In sum, such unquestioned opacity and NGO superiority demonstrates the very malaise that Aarhus

¹¹² One interviewee “was in fact the *only* representative of environmental NGOs in the [a particular Aarhus negotiation] process. There were two other...let’s say, somewhat kindred spirits” (P16). This person recalled that, early in the pre-signature negotiations, UNECE created “a group called the Friends of the Secretariat, which had...six governments or so...and then three others. Two of them were [omitted]...and the other one was myself...So we were right there before the first draft...We were in this group bouncing ideas...And actually we were sent off to do bits of drafting (P16). The participant continued, stating that “the NGOs...asked me to lead the process because I’d kinda led the process up to then...I set up a structure which involved – well, there were four of us on the delegation, who were official NGO members...We had an expert group which, I think at its maximum, was about twenty (P16). Another interviewee, involved as a NGO delegate in the pre-signature negotiations, stated that “we were there with our flag. And we participated like any other country. We would put our flag up...like any other country. And probably, if anybody analysed it, we spoke more than anybody else...And we did our own drafting; we presented our own drafting. We behaved in every way...as if we were a state. Except that we didn’t have a vote” (P21).

seeks to rectify in international environmental governance.¹¹³ This thesis is not alone in observing such problems.¹¹⁴ UNECE itself has voiced similar qualms:

Encouraging the involvement of the ordinary citizen, and not just the experienced...NGOs, was a concern of some interviewees. One...bemoaned the fact that efforts to generate broad, participatory discussions...often failed, while discussions consisted mainly of dialogue between the EU and European ECO forum...This interviewee considered the *domination* of discussion by the EU and European ECO Forum to be “not too healthy” (2013b: 23; emphasis added).

Indeed, during embedded fieldwork, I identified no lay members of the public at the Palais des Nations. This is despite UNECE’s openness to laypersons in most Aarhus proceedings. Also during embedded work, the formal discussions were often dominated by a minority of NGOs (F5).¹¹⁵ This begs the question of whether Parties should be asked to impose some form of ‘green jury service’ on their citizens.¹¹⁶ Furthermore, such a presupposition of

¹¹³ One interviewee admitted to moving to Geneva “to take over the running of the Secretariat” after being “informally approached by people...quite high up in the UN” (P16). The degree of intimacy between UNECE and NGO elites cannot be stressed enough.

¹¹⁴ Pedersen writes that Aarhus “makes no attempt to broaden participation beyond NGOs. In light of the significant increase in various NGOs...which each have their respective agenda, it is debatable whether any groups...represent the public over their own agendas. In a time when NGOs...become...more professional, it is important...that influence and access to participation is not... shifted from executive branches of government to powerful...NGOs pursuing their specific interests with little public mandate (2008: 99). A lawyer stated that whilst Aarhus “might refer to engaging with the public...actually what happens is engagement with NGOs” (P19).

¹¹⁵ I also observed that statespersons representing Parties were often notably quiet, during the conferences I attended (F5).

¹¹⁶ One possible remedy is ‘green jury service’, where states summon citizens for both Aarhus proceedings and domestic decisionmaking. Recruitment would reflect diversity, and would not be prejudiced towards expert elites. For Steele, states can capture, through juries, the “benefits of participation by choosing...citizens who *could be expected to* provide a range of different perspectives” (2001: 435; emphasis in original). Juries help “unearth the kinds of suggestions which might not be proposed by those with day-to-day responsibilities for the problem” (Ibid:

expert elitism may quarantine the very ecological values that civil society initially sought to pursue. Falkner, for instance, observes increasing intimacy between NGOs and governments: “Some activists have voiced concern about the closeness of this relationship fearing that NGOs are in danger of losing their original identity as civil society actors with campaigns driven by ecological values” (2003: 80). Others convey similar arguments.¹¹⁷

Secondly, research queried Aarhus’ provisions¹¹⁸ for identifying the public concerned in decisionmaking procedures. Concern about representativeness and transparency surfaced. Such provisions imply the *inclusion* of some actors, at the expense of others’ *exclusion*. The act of identifying participants creates asymmetries between the identifier and identified; the former bestows privilege on the latter. Holder and Lee substantiate this: “We should be aware of who is allowed or willing to participate, and how the grounds of the debate might work to exclude some ideas and some people” (2007: 129). Nadal observes – in a way that echoes earlier concerns about pillar one – the risk of manipulation:

...participation is likely to be limited to those...favouring the activity to the exclusion of those opposing it...[T]hat any participation would not be secured through ‘capture and coercion’ cannot be guaranteed. By allowing

435). Beierle is another advocate of juries (2002: 746). For Abels, the benefit is that “lay persons are in the driver’s seat...The outcome, the citizen’s report, is...[an] informed lay...perspective on the...issue; it shall enlighten the...debate and may have an agenda-setting function” (2007: 108).

¹¹⁷ Yamin expressed concern about NGOs working in “partnership mode” with power-holders of green governance, writing that “NGOs may get divorced from their claimed constituency and too engaged with the policy process. NGOs may, as a result...be co-opted into existing patterns, undermining their ability to play the ‘conscience-keeping’ role” (2001: 155). Yamin quotes Mucke’s view that “whoever has the requisite personnel and financial resources participates...everyone else stays at home – in particular, organisations from developing countries...and local and regional grassroots initiatives” (2001: 156).

¹¹⁸ See Article 6(5): “Each Party should, where appropriate, encourage prospective applicants to *identify* the public concerned, to enter into discussions, and to provide information regarding the objectives of their application before applying for a permit [to execute the decision in question] (UNECE 1998: 10; emphasis added).

the applicant to be a judge in his/her own cause, the Convention can in effect act as a license for propaganda (2008: 38).

Concerns also surfaced about Article 7¹¹⁹ and its provisions for identifying the public concerned. Specifically, research for this project had qualms about ‘the public which may participate’ being afforded the opportunity to do so, by the relevant public authority. Again, asymmetries emerge between the identifier and identified; the public which may participate has the privilege of participation bestowed on them. That privilege is contingent on the consent of the public authority. State consent, in a broad sense, is evident.¹²⁰ Further, the provision that Parties shall provide for participation ‘to the extent appropriate’ is problematic. Appropriateness is again contingent on state consent. This worries Holder and Lee, regarding “the extent of institutional control over...participation: in particular, familiar and predictable groups may be favoured, and groups with challenging...

¹¹⁹ See Article 7: “Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public...*The public which may participate shall be identified* by the relevant public authority...To the *extent appropriate*, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment (UNECE 2008: 11; emphasis added).

¹²⁰ A lawyer told me that limited dialogue animates environmental decisionmaking in the UK, pursuant to Aarhus (P19). But it remains contingent on the consent of public authorities, still the gatekeepers of ‘purer’ participatory procedures. They stated: “I conducted a study with [omitted] for [omitted], and in that case they went beyond what the legislation required...In some instances, the regulators were aware that it was beneficial to have more dialogue. So they *did* go ahead and create particular events to deal with particular applications. But it was happening on what could almost be described as an ad-hoc basis” (P19). A researcher, fluent in Aarhus’ role in UK green governance, told me that *governance* may mask extant orthodoxies of *government* (P20). They likened ‘new’ participatory procedures to ‘old wine in new bottles’, noting a distinction “between actually what’s happening, and the narrative: what’s being said” (P20). They indicated that powerful actors exploited such procedures by deliberately hindering them: “more powerful and conservative actors use this process to slow down progress” (P20). For these reasons, the speaker remarked: “It would be good if more research was put into grassroots development, where actors almost define themselves; where they would be able to step up and say ‘I want to be part of this, we take a stake in this decisionmaking process’. At the moment, old governmental structures try to implement this, but *put it on* society...and say ‘Now we’re going to do things in an inclusive way’” (P20).

viewpoints could easily be excluded as unhelpful or unconstructive” (2007: 113). It also appeared to worry the third meeting of Aarhus’ Task Force on Public Participation, at which Article 7 was termed “a *particular obstacle* to ensuring effective public participation in decisions on policies” (UNECE 2013f: 8; emphasis added).

Thirdly, research for this chapter raised concerns about Aarhus’ due account provision,¹²¹ under which an environmental decision should evidence reflection on, and assimilation of, public input. Identifying and evidencing links between public inputs and decision outputs is difficult; it becomes problematic when practitioners doubt the relevance and technical value of public inputs.¹²² Further, the value of public inputs becomes debatable when private sector firms are said to be absent from environmental governance procedures under

¹²¹ See Article 6(8): “Each Party shall ensure that in the decision due account is taken of the outcome of the public participation” (UNECE 1998: 11).

¹²² A former President of the US National Academy of Sciences stated that “most members of the public usually don’t know enough about any given...technical matter to make meaningful informal judgements” and that technical decisions should therefore be left to the “knowledgeable wise men” of science and technocracy (in Gauna 1998: 32). Beierle observes two practitioner criticisms of participation: “First is lay people’s susceptibility to...psychological processes that lead them to overestimate some risks and underestimate others... The second...failing...is a political one...In many cases, the participating public...will directly receive the benefits from environmental improvement without having to pay the costs...There is every incentive...to call for more protection than a technocratic weighing of costs and benefits would support...The public’s sense of a ‘good idea’ is considered to be anything but by advocates of a more technocratic approach” (2002: 741). Spyke registers the practitioner view that “the public is emotional and ill-equipped to deal with technical matters. Participation programs demand large amounts of time, are difficult to manage, and conflict with the administrative goal of efficiency” (1999: 292). Reed accepts that decisionmakers “may feel uncomfortable committing themselves to implement...the as-yet unknown outcome of a participatory process. In many cases, to do so would represent a radical shift in the organisational culture of government agencies and other institutions” (2008: 2426). A civil servant, interviewed, indicated that due account receives mixed reactions from practitioners, claiming that “the level of participation proffered to stakeholders varies greatly between authorities” (P2). The official argued that a decisionmaking process can be vastly participatory, yet still elude the most technically effective decision: “Participation is highly valuable in that it generally helps decisions to be just for the wider community, but it does not necessarily result in the best technical solution, because despite the best participatory process, there will always be stakeholders that oppose changes due to...inherent distrust of local and central government” (P2). The civil servant concluded that “there will always be a stakeholder group that believes the exercise is flawed or rigged. Consultation is still the main participatory method in the UK, and until we move away from that, we will not get decisions...that are as just as they can be (P2).

Aarhus.¹²³ Also, if NGOs monopolise participation, representing only the narrowest views, *due* account becomes *one* account of public input. If decisionmaking lacks participation altogether, there would be *no* account. Meanwhile, some doubt whether authorities take full account of public concerns. Such doubts are raised in scholarship,¹²⁴ UN evidence¹²⁵ and fieldwork.¹²⁶

Finally, and echoing earlier qualms with identifying the public concerned, the due account provision creates asymmetries between the actor *taking account of* public input and the

¹²³ An NGO manager stated: "The only time when they [private sector firms] were very keen to participate, and to block everything, and to speak against, was when we were discussing ...GMOs. That was when the biotech industry was attending meetings and saying, well, forget about it, we cannot do it, because that's a commercial secret...But I think in general, their interest is still not sufficient, if we are to speak about a good dialogue (P12).

¹²⁴ Appelstrand deems it crucial to ensure that participation "is neither an illusory spectacle, delivering nothing more than a veneer of democratic participation, nor merely a pro forma matter. Participation must – to have a democratic foundation – have a decisive influence on the outcomes of the decisionmaking process (2002: 288). Arts et al, evaluating the efficacy of Aarhus in the UK, find that "decisions have not always been well accounted for" (2013: 3). Kirk and Blackstock claim that public consultation provides "no guarantee that information made available by the public will be taken into account by the regulator. A right to submit oral or written comments is not quite the same as a right to influence decisions" (2011: 6). For Toth, Article 6(8) is "the vaguest aspect of the Convention" altogether (2010: 305). Fitzmaurice elicits "inherent difficulty in identifying whether and to what extent environmental decisions benefited from public participation" (2010: 51-52). She cites Ebbesson's worry that the very idea of due account lacks precision and provides undue "leeway" for decisionmakers (in Ibid: 52). Gauna concludes that "officials cannot be perfect and cannot escape their own interests. They sometimes opt for the path of least resistance in order to avoid pressure and conflict, or pursue a course that allows them to obtain rewards or recognition" (1998: 31).

¹²⁵ At the third meeting of Aarhus' Task Force on Public Participation, it was noted that public participation was often limited to information disclosure and consultation, rather than more inclusive dialogue and public input (UNECE 2013f: 9). During this meeting, emphasis was placed on pre-emptive participation, the engagement of stakeholders before decisionmaking begins. The Task Force noted that the public should be engaged upfront, to elicit their concerns *before* decisionmaking starts. By doing this, authorities can identify what the public wants: "Empowerment was a key word...Public participation could generate new ideas and options and thus, importantly, should not be used only to validate pre-existing proposals" (Ibid: 9).

¹²⁶ An environmentalist alleged that environmental public participants relied on "grace and favour", arguing that domestic decisionmaking meetings that they attended were often "a complete waste of time" (P7), plagued by foregone conclusions and perceptions that public participants were token symbols of the pillar two legal requirement.

public *taken account of*. The former privileges the latter, bestowing on participants both a voice and an audience. It is worth revisiting Nadal, who argues that by allowing the public “to influence the decision indirectly and conditionally upon the decisionmaker taking due account of...concerns rather than through direct...decision-taking, the Convention is limited to serving as a weak pillar of empowerment” (2008: 44; emphasis added).

Conclusion

Valuable, if fragile, cosmopolitanism was observed in pillar two. Public participation was found to be a tool for cosmopolitan human empowerment¹²⁷ and decisionmaking dialogue¹²⁸, the latter having a civilising impact on its immediate participants (Linklater 2005) as well as international affairs more broadly (Linklater 2005, 2007, 2011c; Payne and Samhat 2004). Via dialogue, humans can ‘own’¹²⁹ their personal circumstances, by influencing decisions that may harm them. In reference to Aarhus, Nadal concludes:

¹²⁷ See Eckersley: “The regulative ideal...of ecological democracy is that all those potentially affected by ecological risks ought to have some meaningful opportunity to participate, or be represented, in the determination of policies or decisions that may generate risks” (Eckersley 2004: 242-243). For Payne and Samhat, cosmopolitanism must incorporate democratic and transparent procedures into all tiers of politics, to “promote and strengthen accountability and participation at the local, national, regional and global levels...[T]here is no requirement for universal consensus on the values, norms and beliefs of a cosmopolitan democratic community, only on the *procedures* through which outcomes are generated and decisions made” (2004: 131).

¹²⁸ Eckersley stresses the value of dialogue: “Even in highly distorted communicative settings parties can still feel obliged to explain themselves to others by *giving reasons* for their preferred positions if they are to persuade others of the acceptability of their arguments or simply to be recognized as legitimate participants” (2004: 151; emphasis in original). For green decisionmaking scholars Duffield Hamilton and Wills-Toker, dialogue is ‘sense-making’ in its proclivity to embrace difference and diversity, engender new understandings of environmental problems, and garner consensus via “a multi-voiced, ongoing struggle among perspectives” (2006: 755).

¹²⁹ Assessing Aarhus, Ebbesson writes that “A core element of any concept of democracy is identifying a form of political and legal organization that reflects government ‘by the people’. As argued in particular by Jürgen Habermas...the ideal democratic form of regulating a community is in part characterised by its procedural nature” (2011: 255). Recall Fitzmaurice’s claim that Aarhus’ concerns for “transparency and participation...fulfil the Habermasian idea of validating and legitimising norms...[which] has played a crucial role in restoring democratic governance [in

By providing an opportunity for environmental justice advocates to participate in such decisionmaking and...challenge the very structural processes that can cause...environmental and social bads, the Convention can allow those suffering environmental injustice to reclaim ownership of the ‘conflict’ of environmental injustice (2008: 37).

Such ‘ownership’ requires dialogue between all decision stakeholders. This echoes Kinsella’s dialogic decisionmaking approach, where “successful policy flows from a broad and comprehensive dialogue in which citizens articulate, interrogate and transform each other’s perspectives. Within this dialogue, the local knowledge of ordinary citizens and the abstract knowledge of technical experts interact synergistically to provide more complete analyses and more effective decisions” (Kinsella 2004: 89). Pillar two gels with Kinsella’s approach; its “ideals of free and equal discourse among participants...significantly empower environmental justice advocates to participate in decisionmaking” (Nadal 2008: 41). The reasoning is that the more abundant and intense the opportunities for dialogue, the greater the chances that citizens will be well-prepared and eager to alter decisions (Beierle 2002: 747). Pillar two echoes Brulle’s notion of analytic deliberation, which

...integrates scientific analysis and community deliberation into a comprehensive strategy for environmental decisionmaking...[and] defines a democratic method for development of government policies that recognises the link between social rationality and public involvement (2002: 15).

advanced democracies] and introducing transparent governance in post-communist states” (2010: 64-65). For Reed, if environmental decisions are achieved via holistic dialogue, stakeholders “are more likely to take *ownership* of the process, partnership building will be more likely, and the outcomes are more likely to be more relevant to stakeholder needs and priorities, motivating their ongoing active engagement” (Ibid: 2424; emphasis added).

Dialogue is a tool for the prevention of imposed harm.¹³⁰ A candid conversation, into which actors enter freely and fairly, with an equal chance to hear and be heard, dialogue is a “means of protecting *individuals* from intended or unintended forms of harm” (Linklater 2005: 144; emphasis added). Dialogue is therefore a constituent of cosmopolitan harm conventions, by virtue of its concern for humans *qua* humans. It brings stakeholders into a decisionmaking community “where they can protest against actions which may harm them...with the conviction that no-one knows who will learn from whom, and that all should strive to reach agreements which rely as far as possible on the force of the better argument” (Ibid: 147).

Crucially for this ES analysis, regimes codifying transparency and dialogue norms “reflect the idea of what Linklater calls a solidarist international society, defined as one in which there is ‘some consensus about the substantive moral purposes which the whole society of states has a duty to uphold’” (in Payne and Samhat 2004: 139). For them, “norms of participation and transparency in international regimes offer great potential for a politics whose ultimate aim is emancipation because regimes constituted by these norms reflect a transformation of political community” from one based on state consent to one in which

¹³⁰ Public participation, conducted to prevent imposed harm, merits a Deweyan conception of the public: “For Dewey the perception of enduring, harmful consequences arising from human activities determines the scope of the public as an associative space of joint problem-solving: ‘the public consists of those who are affected by the indirect consequences of transactions to such an extent that it is deemed necessary to have these consequences systematically cared for’” (in Mason 2005: 22).

autonomous humans not only have a voice and audience, but also a forum in which to influence decisions that may harm them (Ibid: 135).¹³¹

As such, dialogue has emancipatory value. For Payne and Samhat, regimes “incorporating procedural norms of transparency and participation foster a public sphere that creates appropriate conditions for open dialogue and inclusion that considerably enhance the prospects for emancipatory outcomes (2004: 27). If emancipation is “freedom from unacknowledged constraints, relations of domination and conditions of distorted communication” (Ashley in Diez and Steans 2005: 132), dialogue is an emancipatory tool. A deterrent against ‘domination’ and ‘distorted communication’, dialogue is a condition for McBride’s freedom-oriented model of democratic participation:

Non-domination requires not only the rule of law but a particular way of producing laws, one that requires citizens to exercise collective autonomy through an appropriate set of democratic procedures, designed to shut out the possibility of arbitrary interference in others’ lives. These procedures will...have a deliberative character [that]...should permit all citizens to identify with political outcomes as in some sense their own (2013: 497).

Pillar two echoes this principle of non-domination, seeking “the activation of peoples to pursue their emancipation from oppressive structures of governance” (Falk 1995: 164).

Vitally, for the present ES work, such a dialogic turn demonstrates how “the operation of

¹³¹ Payne and Samhat cite Aarhus to this extent, applauding its “explicit end of public accountability and democracy...a possible model for future global action” (2004: 63).

institutions of international society, like diplomacy and international law, are generating new organisations, practices and normative propositions that are novel, in Westphalian terms” (Williams 2005: 27). Here, Aarhus codifies new practices, enabling humans to take ownership of their environmental and personal circumstances. The normative proposition is cosmopolitan, dissatisfied with states’ alleged inability to do the ‘right thing’ for citizens and the environment. Aarhus’ developments are novel, in Westphalian terms, given their cosmopolitan concern for human rather than state harm, and their attempt to impose human justice duties on states. They are also novel in legally bestowing autonomy upon humans in formal environmental decisionmaking procedures.

This pillar augments the first pillar’s attempt to prevent imposed harm. By safeguarding democratic freedom, pillar two gels with Bohman’s notion of human agency as capacity to

...influence deliberation about decisions that affect one’s lives. This is...a matter of...capability. Citizens...must possess the capabilities necessary to make full...use of their public freedom...[and] possess a minimum level of capability for public functioning. This minimum level...is that citizens are able to avoid being *included* in decisions over which they have had no influence; moreover, they must be able to avoid being *excluded* in the sense that their public reasons do not receive effective uptake in the course of deliberation (1999: 503; emphasis added).

However, the start of this conclusion referred to the pillar’s cosmopolitan headway as fragile. This is because a number of impediments to cosmopolitanisation were identified. Firstly, a risk exists that *public* participation becomes *NGO* participation, to the detriment of laypersons. Such problems were elicited as NGO opacity; the risk that civil society

offers a skewed reflection of the public good; a presupposition of NGO superiority; and too close a proximity between civil society and IEP's power orthodoxies.¹³² The impediments to human empowerment, discussed earlier, uphold Kinsella's concern that "public moral argument often collapses into a narrow conversation dominated by technical expertise" (2004: 83). It also upholds his fear that "expert communities become increasingly influential while the public becomes increasingly alienated, leading to monopolistic decisionmaking with little legitimation" (Ibid: 84). The findings also echo Arts et al, assessing Aarhus in the UK¹³³, who find that "new modes of governance can make decisionmaking processes look better than they actually are, and may even harm democratic principles" (2013: 1).

Further, the chapter observed power asymmetries in the pillar, between (a) the identifiers of, and the identified, decisionmaking participants and (b) the actors taking account of the public, and those of whom account has been taken. Put simply, public participation is entirely contingent on state consent. This is deeply pluralist, if we follow Bain's view that "A pluralist world, in which true law is that to which states have given their consent, is

¹³² This thesis refers to power orthodoxies as those traditional channels through which power flows, and is brokered, in IR. Particular reference is made to governments, public administrations, sovereign states more broadly, intergovernmental organisations (IGOs) and international bureaucracies serving international regimes.

¹³³ In their study of Aarhus in the UK, Arts et al found that it was "exactly the currently powerful governmental bodies...whose political authority was given continuation by the lack of detailed legislation. This is...problematic, as it may indicate that the shift from (central) government to (decentralised) governance is...not underpinned by an actual shift in power (2013: 12). Well-consolidated power orthodoxies may prevail with relative immutability. Prophecies of the end of sovereignty as we know it are simply not mirrored in reality. The problem is not whether the 'old guard' is "intentionally creating an old-boy network, but whether old political power structures are endorsed in a new form of governance" (Ibid: 13). For if the status quo is simply rebottled and rebranded, little will change.

also a world in which...individuals enjoy rights insofar as they are concessions granted by the will of the state” (2014: 160).

Finally, whilst the logic is laudable, practical difficulties hinder Aarhus’ cosmopolitanising impact. Proving links between public input and decision outputs is not easy; doubts exist about the relevance of such input; *due* account may actually be *one* account (if NGOs monopolise decisionmaking) or even *no* account (if a procedure lacks any participation); and doubts exist as to whether authorities are as rigorous in taking account of public concerns as they profess. One joins Steele, asking if “the process of dialogue...is being used as a covert method of drawing minorities (or those whose views are not easily couched in rational terms) towards the majority view, or the views of those who define the parameters of what counts as ‘reason’” (2001: 436). Dialogue may not be what it appears. Whilst it seems to cohere with the all-affected principle, it may actually quieten, if not silence, dissent by amplifying majority concerns and railroading consensus. Abels fears that the demands of participation marginalise the already marginalised. Dialogue, in reality, is

...always affected by social factors (e.g. rhetoric skills, social authority). Standards...of political participation (e.g. gender, education, age) also affect deliberative procedures. Furthermore, deliberation favours a model of communication that adapts to rational reasoning...[placing] very high demands on the participants. This...could lead to a *de facto* exclusion of groups...who cannot fulfil such...criteria (2007: 106).

This is an apt point at which to end. It was found that the logic of pillar two is solidarist, concerned for empowering humans to take control of their environmental circumstances

via dialogue and influence. This has a civilising impact, both on participants and states. Such solidarist rationales are, however, constrained by more pluralist realities.

7 Pillar Three: Justice

It is the third pillar on access to justice which lends the Convention its teeth.

Rodenhoff (2002: 348)

Outcome and Safeguard

Justice is the “final and most contentious right of the Aarhus Convention” (Pedersen 2008: 96). For Oliver, it is “the *pièce de résistance* of the Convention” (2013: 1442). It is an *outcome* of the previous pillars: without the entirety of knowledge, and sufficient participatory opportunities, citizens are unable to redress their grievances. It is also the *safeguard*¹³⁴ of the previous pillars, offering mechanisms for challenging contraventions of them. After all, “rights are only meaningful to the extent that they can be vindicated” (Crossen and Niessen 2007: 340). Acknowledging this, the pillar’s aim is to “strengthen access to environmental information, environmental decisionmaking, implementation and enforcement by enabling citizens to invoke the power of the law” (Holder and Lee 2007:

¹³⁴ See Article 9(1): “Each Party shall...ensure that any person who considers that his or her request for information under Article 4 has been ignored, wrongfully refused...inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law”. Article 9(2) states: “Each Party shall...ensure that members of the public concerned (a) having a sufficient interest or, alternatively (b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 and...of other relevant provisions of this Convention”. Article 9(2) continues, stating that the two above conditions, sufficient interest and impairment of a right, are fulfilled by “the interest of any nongovernmental organisation meeting the requirements referred to in Article 2, paragraph 5” (UNECE 1998: 12).

123). Whilst interview participants were not as vocal about justice as they were about the previous two pillars, the pillar's advocates were unequivocal about its benefits.¹³⁵

The pillar evinces cosmopolitan potential, codifying the opportunity for direct enforcement of environmental rights by citizens, in cases where private persons or public authorities have contravened national environmental law.¹³⁶ Finally, by safeguarding free or inexpensive¹³⁷ justice, the pillar has a civilising impact. Noting the civilising process' maxim, 'things that were once permitted are now forbidden', the pillar seeks to end a justice culture that deters citizens from litigation due to inestimable costs. Aarhus 'forbids', in a broad sense, this culture of (legal/financial) injustice, by demanding free or inexpensive redress.

Justice, in Aarhus, is deeply procedural. The Convention offers tools for remedying cases of procedural negligence, where data has been improperly disclosed, or participation incorrectly safeguarded. The logic is that procedurally effective information disclosure, participation and justice afford citizens the tools to alter their environmental circumstances

¹³⁵ An NGO representative stated that justice is "instrumental to implementation" (P15). Another NGO representative agreed: "access to justice still is a really crucial thing. I think without access to justice of course there will not be good information and good participation" (P12). A barrister stated that early in the pre-signature negotiations, the embryonic agreement did not feature justice provisions; it was the NGO delegation that ardently campaigned for the Convention to feature a third pillar with formal redress mechanisms (P21).

¹³⁶ See Article 9(3): "each Party shall ensure that...members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment" (Ibid: 13).

¹³⁷ Article 9(1) secures "access to an expeditious procedure established by law that is free of charge or inexpensive" (Ibid: 12). Article 9(4) demands "adequate and effective remedies, including injunctive relief as appropriate", which are "fair, equitable, timely and not prohibitively expensive" (Ibid: 13).

via decisionmaking influence.¹³⁸ As discussed later, substantive environmental rights figure scarcely in the Convention. This may be an impediment both to environmental protection and cosmopolitanisation. Holder and Lee thus correctly conclude that “Talk of rights in the...Convention seems to be mainly a substantive claim on participation: the rights are an instrument by which to enhance environmental quality” (2007: 100). Mason agrees, noting that Aarhus is a “blend of human environmental rights, marking procedural entitlements as necessary for the successful exercise of substantive environmental rights” (2010: 16).

The pillar has cosmopolitan potential, opening the opportunity for direct enforcement of environmental rights by citizens, in cases where national environmental law is alleged to have been contravened.¹³⁹ According to the official implementation guide, this empowers citizens “to enforce environmental law directly...citizens are given standing to go to court or other review bodies to enforce the law rather than simply to redress personal harm” (UNECE 2000: 130). This is pioneering; citizens become autonomous public legal entities, capable of executing litigation in the public environmental interest, rather than merely to redress their own personal grievances. But the cosmopolitan potential of direct citizen enforcement should not be exaggerated. For Pedersen, “Hopes that [Article 9(3)] would provide for an ‘action popularis’ appear too optimistic” (2008: 98).

¹³⁸ A researcher stated that “if you do the procedural well, you’ll get a better substantive outcome” (P18). To substantiate this, they remarked: “Okay, there is a concerned public that really cares about the environment. But there’s a lot more members of the unconcerned public who couldn’t give a damn. However...if you asked them to think, and gave them greater reflective space, they would actually start to...care. So the procedural realm does help. The procedural stuff is about getting people to see how the environment matters” (P18).

¹³⁹ See note 129 above.

Impediments to Justice

Research identified two key difficulties in the pillar. Firstly, procedural fixations stifle substantive¹⁴⁰ environmental protection. Procedural justice can come too late; it may arrive at the price of substantive environmental protection. Secondly, inexpensive or free justice has eluded environmental justice proceedings pursuant to Aarhus. This project is not alone in voicing such concerns. Aarhus' Task Force on Access to Justice itself found that "The third pillar...is the weakest and...the one most in need of additional and expeditious study" (UNECE 2013d: 1). Such concerns are shared by scholars as well as practitioners.¹⁴¹ And it should not go unnoticed that whilst the EU codified two directives on environmental information disclosure and participation, there is "a proposal – which is *still* a proposal – on access to justice in environmental matters" (P12).¹⁴² According to Toth, this draft was "received very badly" by numerous EU member states (2010: 318). Oliver agrees, writing

¹⁴⁰ The fifth preambular paragraph heeds "the need to protect, preserve and improve the state of the environment and to ensure sustainable and environmentally sound development" (Ibid: 2). The sixth preambular paragraph notes that "adequate protection of the environment is essential to human wellbeing and the enjoyment of basic human rights, including the right to life itself" (Ibid: 2). The seventh preambular paragraph, regarded by the implementation guide as "one of the most important paragraphs in the Preamble" (UNECE 2000: 11), states that "every person has the right to live in an environment adequate to his or her health and wellbeing, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations" (UNECE 1998: 2).

¹⁴¹ For Fitzmaurice, whilst pillar one is implemented extensively, and the second less so, "the most problematic and complicated third pillar...is still not fully implemented" (2010: 56). For Crossen and Niessen, "Within the EU, access to justice for individuals and NGOs has been elusive" (2007: 332). Even when celebrating Aarhus' tenth anniversary, UNECE noted that "many challenges remain. Implementation of...access to justice – and to some extent public participation – continues to be more problematic than the implementation of...access to information" (UNECE 2008f: 1). A lawyer from the former Eastern Bloc simply stated: "The third pillar is not implemented at all" (P1). A lecturer from a former Eastern Bloc territory argued that "access to justice is currently much more important [than the other pillars] because we have more obstacles here than the other pillars" (P10). An NGO delegate remarked that "we need stronger institutions to implement justice" (P15).

¹⁴² Another interviewee, a civil servant, stressed that this draft Directive, tabled in 2003, has made poor progress towards conclusion (P9).

that the draft “fell on stony ground...and has never been adopted” (2013: 1456). Resultantly, EU “access to justice in environmental matters, apart from where it relates to the access to information and public participation directives, remains firmly in the hands of member states’ national law” (Pedersen 2008: 106).

Regarding the first problem, of procedural fixations, stakeholders risk overlooking the environmental merits of decisions, and entangling themselves in the minutiae of *how* decisions are made. Mason writes: “Information disclosure and public participation become more a means for...benchmarking public authorities against procedural checklists rather than substantive environmental standards” (2010: 26). Mason is not alone in raising such concerns.¹⁴³ In an interview, a barrister stated: “The substantive right is acknowledged in Article 1...But it’s not actually guaranteed by the Convention. That is a significant legal point. It’s an acknowledgement of the right, but it’s not a legal source of the right” (P21). This upholds Pedersen’s complaint that whilst Aarhus “recognises the right to live in an adequate environment, it does so without pointing towards where such a right is to be found in other international or European law” (2008: 99).¹⁴⁴ It is thus

¹⁴³ A solicitor was frustrated with the procedural preoccupations of green justice. They stated that judicial review, for instance, “is a procedural remedy, not a substantive remedy. So you have to dress up what are actually merits-based challenges, in procedural clothes. So it’s all about ‘did you consult properly?’ or ‘did you take this factor into account or not?’ And actually what they’re *trying* to address is the reasonableness of making decisions to proceed with a third runway at Heathrow or whatever” (P3). Déjeant-Pons and Pallemarts agree: “It is striking that the fundamental right to live in a healthy environment, at the very moment of its legal recognition, finds itself...immediately reduced to its mere procedural dimension” (2002: 18). Dellinger notes: “Substantive change brought about by the Convention must thus come *indirectly* through its procedural provisions. But is it realistic to hope that what are, after all, mere procedural provisions...will also result in substantive environmental change...?” (2012: 333). For Getliffe, procedural rights “alone will not result in substantive change” (2002: 114). Lee and Abbot argue: “Procedure is not an alternative to making hard decisions on substantive regulation” (2003: 94).

¹⁴⁴ Pedersen observes that “at present, a substantive human right to the environment does not yet exist in international law and...approaches towards the creation of such a right have largely halted” (2008:74). See Crossen and Niessen’s observation that Aarhus “*recognizes* a substantive right...but only *creates* procedural rights in relation to the environment” (2007: 333; emphasis in original).

understandable why the UK issued a declaration, on signing Aarhus, stating that the Convention's references to a right to a healthy environment were an "aspiration" alone (Crossen and Niessen 2007: 333). Such aspirational weakness means that the likelihood of substantive environmental protection is "dissipated by the de facto marginalisation of the substantive right" (Mason 2010: 27). And ultimately, "the emancipatory intent of the...substantive right suffers" (Ibid: 28).

Embedded work revealed that in some instances, environmental litigation is hindered by a five year delay (F1). *Lappel Bank*¹⁴⁵ demonstrates the risk of procedural fixations, which hinders decisive and immediate action in response to urgent environmental problems. In 1996-7, the Royal Society for the Protection of Birds (RSPB) challenged the failure of the UK government to classify a Medway mudflat, Lappel Bank, as a Special Protection Area (SPA) (Khalastchi 1999: 304). The salient dilemma was whether economic factors could be considered when creating such zones. The UK government argued that economic factors *were* relevant. At the time, Sheerness Port was expanding, and had identified Lappel Bank as a site for development. Indeed, "Lappel Bank was the only area into which the port of Sheerness could realistically envisage expanding" (Nordberg 2007: 95). The port was "a significant employer in an area with high unemployment" (Marsden 2002: 36). The RSPB used previous European Court of Justice (ECJ) jurisprudence to argue that only ornithological factors were relevant at the designation stage. In the Court of Appeal, a majority ruled in favour of the government. The RSPB appealed to the House of Lords, which refused interim relief but referred the case to the ECJ. Between the refusal of interim relief and the ECJ ruling, the Lappel Bank habitat was destroyed. Later, the ECJ ruled in

¹⁴⁵ Besides the scholars referenced above, see also Beijen (2009).

the RSPB's favour, stating "clearly that the delimitation of SPA sites must be based on ornithological criteria only (Nordberg 2007: 102). But this favourable ruling came too late. The refusal of interim relief "raises important questions about the availability of interim relief" (Marsden 2002: 36). One can only speculate whether Aarhus' provisions¹⁴⁶ would have helped prevent the RSPB's Pyrrhic victory, and safeguard substantive justice at Lappel Bank. This is because Aarhus was not signed until 1998: the pre-signature negotiations were still ongoing during the case, whose litigation was between 1996 and 1997.

Indeed, during an interview, a barrister remarked: "Is Lappel Bank an important area for birds, or is it a car park? And if the procedural rights don't actually enable the substantive right to be played out, then of course they're failing" (P21). Embedded fieldwork elicited fears of cases being 'won in the court, but lost on the ground' (F6). Embedded research gauged a degree of agreement that an excellent ruling, made ten years too late, does more harm than good. The Sullivan Report noted that "success in...judicial review can be entirely academic. Being able to obtain an injunction (or...court procedures so speedy that the case can be determined before the damaging process is commenced) is key" (Working Group on Access to Environmental Justice 2008: 14).¹⁴⁷

¹⁴⁶ See note 131 above.

¹⁴⁷ The Sullivan Report continues by stating that a key problem with "injunctions is that the court may...require the claimant to give a cross-undertaking in damages...[that] may involve an...uncertain potential liability of several thousand, if not several hundreds of thousands, of pounds. Developer third parties have an incentive not to underestimate the...loss from the...injunction, precisely to scare the claimant away...As a result, injunctions are rarely pursued...The consequences...can be irreversible – as witnessed by the RSPB's pyrrhic victory at Lappel Bank (Working Group on Access to Environmental Justice 2008: 26).

The costs of injunctive relief, cited by the Sullivan Report in a footnote below, illustrate the second problem of pillar three: financial risk. Decision III/3, issued at MoP3 in 2008, stated that “financial barriers...continue to pose a significant obstacle to access to justice” (UNECE 2008d: 2). Pedersen notes that “many prospective environmental claims never make it to the courts as a result of the high costs facing litigants” (2011: 121). The Sullivan Report¹⁴⁸, alongside fieldwork¹⁴⁹ and scholarship¹⁵⁰, corroborates this. The best evidence of this impediment, however, is a recent ECJ Case, C-260/11 (ECJ 2013). This entails proceedings between Edwards/Pallikaropoulos and the UK Environment Agency (EA) and Secretary of State for Environment, Food and Rural Affairs. The case concerned a permit, issued by EA, for a Rugby cement plant. Edwards challenged EA’s decision to approve it. His action was dismissed. Edwards went to the Court of Appeal but withdrew. Pallikaropoulos became an appellant, so as to reverse Edwards’ dismissal. The Court of Appeal dismissed her own appeal, ordering her to pay her costs *and* her opposition’s. Pallikaropoulos appealed to the Lords, asking not to be required to compensate. Her request was refused. On 18 July 2008, the Lords ordered Pallikaropoulos to pay two bills: £55,810 and £32,290. On 1 October 2009, the Lords’ remit transferred to the Supreme Court. It was asked to rule whether Pallikaropoulos should compensate. It judged, on 15

¹⁴⁸ Mr Justice Sullivan noted that “Unless more is done, and the...approach to costs is altered...to recognise that there is a public interest in securing compliance with environmental law, it will only be a matter of time before the United Kingdom is taken to task for failing to live up to its obligations under Aarhus” (Working Group on Access to Environmental Justice 2008: 2). The Report cites an EC study, which, in reference to the UK, notes: “the main obstacle to access to justice...is the issue of costs in judicial review...The problem is one of exposure and...uncertainty. At the beginning of a case it is impossible for the member of the public or...NGO to know how much money they will have to find if they lose...Studies have indicated that a substantial number of potential applicants...have not proceeded because of the risk of costs involved” (in Ibid: 10).

¹⁴⁹ A solicitor indicated that the costs barrier was the cardinal stimulus for their involvement with the Convention. In their view, costs were the “main obstacle” to justice, and required attention from legal practitioners (P3).

¹⁵⁰ See Holder and Lee’s claim that “litigation is frequently not pursued...simply because it would be financially crippling” (2007: 118).

December 2010, that the Lords had failed to assess whether the demand for compensation contravened regulations such as the Convention. It referred the issue to the ECJ for a ruling.¹⁵¹

A dilemma was whether it is “relevant that the claimant has not in fact been deterred from bringing or continuing with the proceedings” (Ibid: 7). Despite surely knowing her costs would be colossal, Pallikaropoulos continued dauntless. Such action could, on one hand, be deemed virtuously cosmopolitan: one human, driven by moral conviction, sought the public environmental good, and placed the planet and public before herself. Conversely, Pallikaropoulos deliberately acted in a way that would *inevitably* incur *unreasonable* costs. Under this logic, she took absolutely no due care and attention for the consequences of her actions, despite alleged covert attempts to persuade her to withdraw from the litigation.¹⁵²

On 11 April 2013, in a “remarkable judgement, which breaks totally new ground” (Oliver 2013: 1459), the ECJ ruled that the provision for justice to not be prohibitively expensive means that persons “should not be prevented from seeking, or pursuing a claim for, a review by the courts...by reason of the financial burden that might arise as a result” (ECJ

¹⁵¹ The Supreme Court asked: “How should a national court approach the question of awards of costs against a member of the public who is an unsuccessful claimant in an environmental claim, having regard to the requirements of Article 9(4) of the Aarhus Convention, as implemented by Article 10a of Directive 85/337 and Article 15a of Directive 96/61” (in ECJ 2013: 7)? The Supreme Court also asked: “Should the question whether the cost of the litigation is or is not ‘prohibitively expensive’ within the meaning of Article 9(4) of the Aarhus Convention...be decided on an objective basis (by reference, for example, to the ability of an ‘ordinary’ member of the public to meet the potential liability for costs), or should it be decided on a subjective basis (by reference to the means of the particular claimant) or upon some combination of these two bases (in Ibid: 7)?

¹⁵² Fieldwork elicited claims that civil servants, lawyers and green activists had tried to persuade Pallikaropoulos to withdraw from the case, with the aim of achieving a mutually acceptable, informal agreement. One interview indicated that green activists themselves asked the government to avoid charging full compensation, in case it made Pallikaropoulos “a martyr” (P omitted). These are powerful words that poignantly demonstrate the present difficulties afflicting pillar three.

2013: 12). Concurrently, the EC brought proceedings against the UK, “complaining of a systemic failure in England and Wales as well as in Scotland and Northern Ireland to comply with the ‘prohibitively expensive’ rule” (Oliver 2013: 1459). As a result of this ruling, persons should not be deterred from litigation due to possible financial costs.¹⁵³ Further, judiciaries must consider the benefits of successful litigation for citizens *and* the environment.¹⁵⁴ Judiciaries must also assess a claim’s frivolity. The ECJ is enigmatic here: “the fact that a claimant has not been deterred...from asserting his claim is not...sufficient to establish that the proceedings are not prohibitively expensive for him” (Ibid: 13). In other words, a litigant’s ardour is insufficient evidence to indicate that she or he can afford to sue. The logical corollary is that judiciaries must not draw assumptions from the zeal of litigants, and should seek more concrete evidence to establish whether they can afford to sue or not.

Whilst it is tempting to conclude that this jurisprudence indicates progress made by those applying Aarhus in court, the reality is different. This progress was achieved because the

¹⁵³ See ECJ (2013: 12): “Where a national court is called upon to make an order for costs against a member of the public who is an unsuccessful claimant in an environmental dispute or...where it is required...to state its views...on a possible capping of the costs for which the unsuccessful party may be liable, it must satisfy itself that that requirement has been complied with, taking into account both the interest of the person wishing to defend his rights and the public interest in the protection of the environment”. During embedded fieldwork, praise was voiced for the UK’s new cost regulations, and the provision that whilst complainants who lose a case must pay their own costs, their opposition’s costs are now capped (F4). The 66th Update to the UK Civil Procedure Rules came into force on 1 October 2013. PD3E on Costs Management is amended with a revised Precedent H, a document which delineates the myriad costs that must be calculated when undertaking legal proceedings. Part 47, ‘Procedure for Assessment of Costs and Default Provisions’, makes a modification to clarify the amount of costs that may be recovered for matters that do not go beyond provisional assessment of costs, and whether that amount includes court fees and VAT (F4).

¹⁵⁴ The ECJ ruled that courts “cannot act solely on the basis of that claimant’s financial situation but must also carry out an objective analysis of the amount of the costs. It may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment” (Ibid: 12-13).

Lords had overlooked the cardinal question of whether compensation demands complied with Aarhus' 'reasonable costs' provision. A judicial faux pas stimulated this progress, which remains inherently procedural: after all, the Rugby cement plant still stands. Having discussed the above jurisprudence with a solicitor, they claimed: "All that procedures do... is enable you to buy yourself a bit more time. You go through JR [judicial review]. If you win, quite often they just make the decision again, but do it right, and it comes to the same conclusion. It can be quite hollow (P3).

Conclusion

Pillar three has cosmopolitan potential. An outcome of and safeguard for information access and participation, it is a tool for human empowerment, embodying the emerging law of humanity, whose "reality has been established through the primary agency of states... [yet] is predominantly a consequence of its implementation through the agency of civil society" (Falk 1995: 163). The pillar empowers citizens to redress breaches of (a) Aarhus' first two pillars and (b) domestic environmental law. By providing for direct citizen enforcement, the pillar exemplifies a more realistic, evolutionary approach to what Falk would refer to as a law of humanity, "enacted by and for the peoples of the world...a counter-institution intended to expose the abuses of states and the deficiencies of international institutions, and to provide civil society with its own autonomous voice" (Ibid: 165).

Pillar three does not attenuate sovereignty, but fosters a more responsible sovereignty in which humans hold states, authorities and developers environmentally accountable. State orthodoxies remain, but cosmopolitan values enrich them, rendering them more human-

oriented. Stricter duties are imposed on states, in the green public interest. Demands for free or inexpensive redress allow humans, in theory, to confidently challenge procedural impropriety or substantive illegality. The status quo is cosmopolitanised from within. This helps fulfil Eckersley's wish "not to replace states but rather to find more effective and more legitimate ways of addressing the shortcomings of exclusive territorial governance" (2004: 193). Eckersley deems Aarhus "a significant step towards transnationalising ecological citizenship" (2004: 194).

Pillar three equips humans with 'active agency', the propensity to "reason self-consciously, to be self-reflexive and...self-determining" (Kent 2011: 69), which entails the "moral obligation to act on the part of the individual...even where governments fail to take action" (Ibid: 70). Pillar three provides the tools for active agency, easing the discharge of such obligation. Whilst in the climate regime, "Westphalian norms have stifled diplomacy and prevented policy innovations, fundamentally ignoring the rights, responsibilities and duties of *individuals* (Harris 2011a: 177; emphasis in original), Aarhus uses those same norms to *empower* humans in their quest for justice. States *recognised*, rather than ignored, humans' role in protecting their environment. The above mechanisms exemplify the "cosmopolitan ethics" that Harris demands (Ibid: 178), embracing Elliott's claim that "an ecologically sensitive cosmopolitanism demands transnational environmental justice between people within a world society as well as...international justice between states in an international society" (in Ibid: 183).

However, this chapter identified serious impediments to cosmopolitanisation. The practical gravity of direct citizen enforcement is questionable. What appears deeply cosmopolitan, on paper, may make scarcely a ripple in the real world. Human empowerment only has

substantive environmental benefits if empowered humans (successfully) apply their rights. The civilising impact of demanding free or inexpensive justice from states is questionable. Progress was only made when this provision's shortfalls, and its weak application by a domestic judiciary, were exposed. Aarhus' procedural preoccupations put both states and citizens at risk of blinding themselves to the substantive environmental merits of decisions. This hinders cosmopolitanisation. It is more than reasonable to expect a large proportion of concerned citizens to avoid the pursuit of green justice, simply by virtue of the costs – the time, effort and ultimately money – involved.

8 Regime Effectiveness

The state remains of paramount importance in global and national environmental governance, if only because the world society is still partly based on state units and international negotiations are largely conducted and concluded by state representatives in spite of dreams of a postsovereign world order.

Compagnon et al (2012: 255)

By far the most important way that the international community has sought to govern the global environment is through cooperation among nation states and the creation of multilateral environmental agreements (MEAs).

O'Neill (2009: 71)

This chapter investigates Aarhus' potential as an international environmental regime.¹⁵⁵ It is concerned for assessing whether Aarhus is a 'typical' MEA¹⁵⁶, and whether it in any way

¹⁵⁵ Regimes are sets of "principles, norms, rules and decisionmaking procedures around which actors' expectations converge in a given area of international relations" (Krasner 1983b: 2). They solve problems shared by states, which benefit from the absolute gains of multilateralism. States' perceptions of their interests, and the parameters of prescribed/proscribed behaviour, are moulded by regimes' norms, laws, and the socialisation of statespersons in a diplomatic arena. Regimes facilitate networks in which states "agree to the same set of formal rules,...[belong to] the same culture of...rules...[and] interact...in negotiating and implementing" treaties (Ward 2006: 152).

¹⁵⁶ Regimes are not MEAs. MEAs are *one* (legal-regulatory) element of regimes, codifying the latter's norms, and binding Parties to regime rules, and *each other*. MEAs, regimes' legal teeth, have three functions. The *legislative* function creates "legal principles and rules which impose binding obligations requiring states and other members of the international community to conform to certain norms" (Sands 2003: 12). The *administrative* function gives "tasks to various actors to ensure that the...principles and rules of international environmental law are applied" (Ibid: 12-13).

surpasses the limits of a ‘typical’ MEA, legally entrenching a regime that seeks more than is typically expected of environmental regimes. This chapter follows Andresen’s approach to evaluating environmental institutions¹⁵⁷ and regimes, which was distilled in his seminal article, ‘The Effectiveness of UN Environmental Institutions’ (Andresen 2007), and honed in *International Environmental Agreements* (Andresen et al 2012c). Following Andresen, this chapter explores Aarhus’ normative, cognitive and institutional potential. The latter discusses the Convention’s strategic, operational and tactical tiers. An analysis of the compliance mechanism ensues in the context of the tactical tier.

Evidence of solidarism was identified in the regime. Aarhus demonstrates valuable norm enforcement potential, not only propagating green transparency norms, but establishing robust mechanisms for enforcing them. The regime has ‘bite’, altering state practices in a Compliance Committee that is court-like, if not a court *per se*. Aarhus’ provision for individuals to directly allege state contraventions is pioneering in IEP. It paves the way for citizens to play a greater role in holding states accountable for their improprieties. The regime does not attenuate sovereignty, but enables humanity to enrich IEP’s power orthodoxies. Evidence indicates that Aarhus should be equated with a cosmopolitan green harm convention. This is demonstrated by the Convention’s provisions for individuals to discharge their rights without persecution or discrimination according to their nationality,

Thirdly, the *adjudicative* function offers “mechanisms...to prevent and...settle differences...which arise between members of the international community involving the use of natural resources or the *conduct of activities* which...impact upon the environment” (Ibid: 13; emphasis added).

¹⁵⁷ Just as regimes are not MEAs, MEAs are not intergovernmental organisations (IGOs). Firstly, they have an issue-specific, “ad hoc nature” (Churchill and Ulfstein 2000: 623). Secondly, whilst MEAs are “more than just diplomatic conferences” (Ibid: 623), they are not IGOs *per se*. Rather, they are “autonomous institutions” (Ibid: 623) with their own decisionmaking and compliance structures, which come under an umbrella IGO.

citizenship or abode. Solidarity is also evident in the possibility for any state to join the Convention. As revealed below, ample scope remains for global expansion.

Solidarity is also evident in the dialogic nature of Aarhus' internal machineries. Fieldwork observed a striking degree of frank, unimpeded dialogue between states, civil society and the international civil service. Aarhus' internal proceedings offered a 'level playing field' on which all stakeholders had an equal opportunity to hear and be heard. The impression gained was that Aarhus was seeking to lead by example, and 'live' its principles of participatory equality, transparency and democracy. This was also demonstrated in the compliance mechanism's dialogic provisions. The Convention is a springboard from which the cosmopolitan dialogue principle can be practically integrated into 'real world' IEP.

But it would be naïve to claim that the regime is more *revolutionary* than *evolutionary*. Evidence of pluralism surfaced. This is to some significant degree inevitably reassuring. Without state consent, there would be no multilateralism and no chance for states to assign environmental rights to citizens. Regimes entail the voluntary exercise, not abrogation, of sovereignty (Eckersley 2004: 30). Their legal teeth, MEAs, are signed pursuant to international treaty law, specified in the Vienna Convention (United Nations 1969). States enter into legal arrangements as freely as they can leave them. Sovereignty, states' mutual currency, is a conduit for identifying and codifying shared norms. Sovereignty remains an enduring pillar of IEP. Compagnon et al are thus well-advised to write that "The valid critique of the overstated centrality of the state in classical international relations theory... should not lead us to support the opposite and perilous assumption that the state as a concept has lost relevance in governance theory" (2012: 237). Aarhus' provisions for the right to know, participatory empowerment and human justice would collapse if Parties

boycotted or exited the Convention. These provisions would not have arisen, had Parties not undertaken the negotiations and lodged their signature at the UN. Without state consent, this form of cosmopolitan normative progress would have eluded IEP altogether. States assign rights to citizens; states bestow on civil society a voice and an audience. This heeds the view of Compagnon et al that “private authority and transnational governance rely on the international state system for legal frameworks of operation and normative foundations” (Ibid: 237). States are the gatekeepers that “control various flows: external funding, outside manpower, and expertise” (Ibid: 253). Compagnon et al are not the only scholars to have raised such observations.¹⁵⁸

However, this is not to deny that sovereignty has changed under the regime. Aarhus demonstrates the feasibility and normative benefit of a more *responsible sovereignty* in IEP. The regime has a cosmopolitanising impact. Aarhus’ solidarism enriches the pluralist realities that must be expected, given Westphalia’s impenetrable framework according to which our political world is delineated. In sum, Aarhus is an MEA that necessarily embodies a society of *states*, united in their concern for green transparency. It follows the well-worn path of international law, an invaluable orthodoxy that has stood the test of time, being used ceaselessly by states to solve collective problems. Aarhus’ key achievement is to have incrementally cosmopolitanised IEP with its solidarist ambitions, its dialogic processes and machineries, and its pioneering attempt to situate the human, rather than the state, at the heart of its concerns.

¹⁵⁸ O’Neill writes that “countries, or more accurately, their governments, are the *only* actors with decision-making authority in the international system...Only governments...are empowered to make environmental regulations enforceable on their own populations. States can...draw on an impressive array of resources, from military and economic power to political and social legitimacy to meet their goals (2009: 48; emphasis added).

Normative Potential

Regimes with significant normative potential are “at pains to establish and communicate clear goals and values” (Andresen et al 2012a: 6). They not only propagate their values within and between Parties, but also court attention from beyond their sphere of influence, and ‘export’ their values and principles, propagating them in new territories. In the area of goal creation and communication, Aarhus created, and conveys, unequivocal objectives, fostering normative affinity and belonging between Parties.¹⁵⁹ The Preamble¹⁶⁰ lays strong normative roots, stressing the value of green transparency and democracy. Articles 1¹⁶¹ and 3(1)¹⁶² outline Aarhus’ unambiguous goals, whilst Article 3(7)¹⁶³ ambitiously enjoins Parties to apply Aarhus’ principles not only inside their jurisdictions, but also at the broader diplomatic level. Of fundamental import is Article 3(8)¹⁶⁴, which brings Aarhus

¹⁵⁹ A solicitor suggested that Aarhus’ greatest achievement was to have fostered a growing mutual recognition, between a diversity of states, of the value of environmental protection and environmental human rights. The implication was that this incurred a greater sense of belonging and normative affinity (P13).

¹⁶⁰ The Preamble stresses “the need to protect, preserve and improve the state of the environment and to ensure sustainable and environmentally sound development”. It seeks “to further the accountability of and transparency in decisionmaking”, and aims to “promote environmental education to further the understanding of the environment and sustainable development and to encourage widespread public awareness of, and participation in, decisions affecting the environment and sustainable development” (Ibid: 3).

¹⁶¹ See note 34 above.

¹⁶² Article 3(1) states: “Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention” (UNECE 1998: 5).

¹⁶³ See Article 3(7): “Each Party shall promote the application of the principles of this Convention in international environmental decisionmaking processes and within the framework of international organisations in matters relating to the environment” (Ibid: 5).

¹⁶⁴ See Article 3(8): “Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalised, persecuted or harassed in any way for their involvement” (Ibid: 5).

closer to the realm of cosmopolitan harm conventions in its concern for protecting humans who use their Aarhus rights. Equally significant is Article 3(9)¹⁶⁵, assigning rights without regard for citizens' nationality or abode. This brings Aarhus closer to the realm of cosmopolitan harm conventions, in its recognition of humans *qua* humans, and its propensity to render state borders immaterial when assigning rights to individuals.

Taking into consideration norm propagation beyond the regime's immediate sphere of influence, Article 19(3) is invaluable, ensuring that any state "that is a Member of the United Nations may accede to the Convention upon approval by the Meeting of the Parties" (UNECE 1998: 17). This is keenly solidarist, beckoning a more expansive "institutionalisation of shared interests and values in systems of agreed rules of conduct" (Buzan 2004: 61) that surpasses Aarhus' immediate catchment area. The potential for normative expansion manifests itself in three ways: via *accession*, *replication* and *global diplomacy*.

In respect of accession, particularly noteworthy is Paragraph 10(d), Objective II.4, of Aarhus' 2009-2014 Strategic Plan. This demands that "States in other regions of the world...exercise their right to accede to the Convention. Parties actively encourage accession...by States of other regions of the world with the aim of, by 2011, having Parties which are not member States of UNECE" (UNECE 2008e: 6). This was not fulfilled: no accession has occurred, and there seems scarce appetite for it. D'Silva and van Calster are doubtful of this expansion route, writing that whilst Aarhus

¹⁶⁵ Article 3(9) states that "the public shall have access to information, have the possibility to participate in decisionmaking and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities" (Ibid: 5).

...is open to non-UNECE states...how this provision will take shape is yet to be ascertained. Countries like the United States not being a signatory defeats the internationalisation of the...Convention and hence it cannot be considered a truly global initiative (2010: 23).

The absence of the USA and Canada, themselves UNECE members, is a problem. Regime laggards rather than leaders, they cited their already adequate domestic provisions for environmental transparency and democracy, when refusing ratification (Dellinger 2012: 357). The USA expressed concern with the Compliance Committee, especially the “variety of unusual procedural roles that may be performed by non-State, non-Party actors, including the nomination of members of the Committee and the ability to trigger certain communication requirements by Parties under these provisions” (UNECE 2002b: 19). The USA voiced concerns about the compliance mechanism’s compliance with Aarhus itself.¹⁶⁶ It is worth also reiterating an earlier observation that whilst Russia contributed to the pre-signature negotiations, it eventually withdrew and refused to sign Aarhus.¹⁶⁷ It is puzzling that in Western Europe, only Ireland and Iceland are yet to ratify (Dellinger 2012: 358).

¹⁶⁶ See the official report of MoP1, which quotes the USA as stating: “We were...disappointed with both the negotiating process and the substantive outcome...[T]here are many curious and troublesome elements of the compliance regime. We do not consider the compliance rules adopted here to be a precedent for compliance procedures in other regional or multilateral environmental agreements. These procedures are a product of this specific treaty and were agreed by Aarhus Parties for use among themselves...We have questions about whether elements of these rules are consistent with the Aarhus Convention itself” (UNECE 2002b: 19).

¹⁶⁷ See p.41 above.

Furthermore, a recent UNECE report implied that EU laggardness may be hindering accession. Such laggardness accrues from the EU being neither the regime leader, nor the body under whose auspices Aarhus is managed. It also accrues from the need for traditional EU donor states to ‘digest the Convention’, implying a lack of cognitive capacity and resources in EU member governments. Resultantly, expansion

...has become more difficult as strong resistance has emerged, particularly from EU member States. This has had an effect on resources – the need of the traditional donor countries to digest the Convention has put the brakes on the dedication of resources for extension of the regime. Thus the EU is not the frontrunner, which is a bit different from the usual situation in many MEA regimes (UNECE 2013b: 27).

Most participants in the recent UNECE investigation were

...sanguine about recent developments, or at least resigned to them, and have shifted their focus to the positive aspects of continuous information exchange aimed at standardising, deepening and strengthening the implementation of the Convention as it stands. Some are concerned that pushing for new processes aimed at furthering progress in the regime might actually open up the Convention to backsliding on some issues (Ibid: 27).

Prevalent sentiment is thus opposed to early expansion, favouring implementation improvement in the existing Aarhus region. Premature expansion may eclipse problems ‘here and now’, and cause backsliding in present Parties. Whilst fieldwork detected

cautious support for accession,¹⁶⁸ one informant was dissatisfied with Article 19(3), and concerned that states would avoid accession if (a) they perceived Aarhus to be a solely European phenomenon or (b) they had not influenced the pre-signature negotiations.¹⁶⁹ Work for this chapter found that Mongolia is a likely accession candidate. At MoP4, in 2011, Aarhus' secretariat reported that Mongolia's Presidential Office had expressed interest in accession, calling for assistance to this end (UNECE 2011b: 9). China has also been curious: between 2005 and 2008, the secretariat was twice invited to present "to Chinese government officials and other stakeholders...the experiences and challenges its Parties have encountered in implementing the Convention" (UNECE 2008f: 3). A result of this diplomatic interaction was China's creation, in 2008, of its Open Government Information Regulations. These data disclosure provisions apply to "central, provincial and

¹⁶⁸ An NGO manager claimed "the whole idea of the...Convention was that...countries outside... UNECE can join. So far we do not have any other countries" (P12). They stressed, however, that accession should be conditional: "you cannot just let anyone in...we certainly wouldn't want to see countries like Syria applying for the Aarhus Convention" (P12). One participant critiqued Aarhus' accession record, demanding more effort to be taken to unlock Aarhus' gates: "This provision unfortunately specifies that...accession is subject to the approval of the...Meeting of the Parties, which is...in a way a procedural obstacle, and...also a political obstacle. Because it means...that a country like Brazil or South Africa, that wants to accede...needs the permission of the governing body, which only meets every three years (P16). Embedded work revealed major disappointment with Aarhus' poor accession record (F15). It elicited concern that acceding states are deterred by the perception that the MoP requires certain qualities such as a well-consolidated liberal democratic political culture, or a sense of European belonging, for states to be admitted to the Aarhus 'club'. However, delegates at the events under my observation reiterated that states cannot be forced to accede: accession is ultimately their choice (F15).

¹⁶⁹ One informant stated: "It would have been better...to...amend the Convention to simply get rid of this requirement of approval: just deleting eight words from Article 19(3)" (P16). Pre-deletion, Article 19(3) would read: "Any other State, not referred to in paragraph 2 above, that is a Member of the United Nations may accede to the Convention upon approval by the Meeting of the Parties" (UNECE 1998:17). Post-deletion, it would read: "Any other State, not referred to in paragraph 2 above, that is a Member of the United Nations may accede to the Convention". Article 19(2), to which Article 19(3) refers, states: "This Convention shall be open for accession as from 22 December 1998 by the States and regional economic integration organizations referred to in Article 17". The participant concluded: "we've made very little progress towards getting non-UNECE countries to accede...I think there's a political perception of Aarhus as a European instrument, or 'European-Plus' that includes the Central Asian countries" (P16). The speaker complained that it can be difficult to "persuade countries to accede to something they had no part in negotiating" (P16).

local government agencies. The rules...give the public the right to seek information from the government through written inquiry” (Ibid: 3). Whilst China’s appetite for, and likelihood of, accession must surely be tiny, it is significant that engagement has occurred with this emerging global power.

Regarding replication, Aarhus fulfilled Paragraph 10(e), Objective II.5, of its 2009-2014 Strategic Plan, demanding that it “inspires the development of similar instruments in other regions of the world” (UNECE 2008e: 6). Current progress in ECLAC (Economic Commission for Latin America and the Caribbean) exemplifies Aarhus’ capacity to propagate norms beyond its immediate catchment area. That current progress in ECLAC offers the most replication potential¹⁷⁰ should not be surprising: ECLAC attended Aarhus’ first MoP in 2002 (UNECE 2002b: 1) and played a vital role in the 2004 Nuevo León Declaration, issued at the Special Summit of the Americas, coinciding with negotiations for a protocol on access to information and public participation for the Mercosur States (Argentina, Brazil, Paraguay, Uruguay), Chile and Brazil (UNECE 2005b: 16). UNECE and ECLAC share strong affinities: both are very similar regional economic commissions with robust environmental policy units. Knowledge, best practice, implementation experience and legal precedent can be shared by both, with the view to replicating Aarhus in another region.

¹⁷⁰ One informant deemed ECLAC “the most promising example” of replication, where “a number of Latin American and Caribbean states...signed a Declaration at the Rio+20 conference...basically committing to explore the possibility for a regional approach, and mentioning the possibility of a regional instrument” (P16). This informant claimed ECLAC is “now following a process which, in the next few months...will probably result in a decision to start negotiating a legally binding instrument (P16).

Such propagation ‘beyond the border’ of UNECE is indeed solidarist. But a degree of pluralism was evident, during embedded fieldwork, in ECLAC’s and other stakeholders’ desire to preserve the ECLAC region’s distinctiveness, difference and diversity. The accent was on avoiding homogenisation, cultural imperialism and imposition of universal rights on a very particular region. During embedded fieldwork, one of the conferences attended by the researcher held a teleconference with ECLAC officials. A sense was elicited that whilst ‘another Aarhus’ was emerging (F14), many delegates opposed ECLAC states’ accession via Article 19(3). The prevalent sentiment was that such states desire ownership of their own regional instrument, accommodating their cultural distinctiveness. A diplomat stated that ECLAC “has to follow its own path for implementation” (F14). This pluralist desire to preserve difference and diversity was reflected in interviews.¹⁷¹

At the global diplomatic level, the United Nations Environment Programme’s (UNEP) *Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters* (Bali Guidelines) are crucial, sharing normative affinities with Aarhus.¹⁷² They are a possible catalyst for negotiating a

¹⁷¹ One civil servant was “cautious” about replication, envisaging risks if actors were to “directly take Aarhus and transpose it” elsewhere (P9). An NGO manager remarked that “countries not only in the South, but in other parts of the world, are quite sensitive about being pushed, or being told they have to join the Convention. They see the Aarhus Convention as something for the North” (P12). Therefore great stress was placed on replicating Aarhus in a way that would preserve regional diversity and difference, and not appear culturally imperialistic.

¹⁷² One participant stated: “Aarhus people...were very much involved in the preparation of those Guidelines” (P16). Guideline 1 states: “Any natural or legal person should have affordable, effective and timely access to environmental information held by public authorities upon request...without having to prove a legal or other interest” (UNEP 2011: 5). Guideline 8 demands “early and effective public participation in decision-making related to the environment” (Ibid: 6). Guideline 9 provides that “States should, as far as possible, make efforts to seek...public participation in a transparent and consultative manner, including efforts to ensure that members of the public concerned are given an adequate opportunity to express their views” (Ibid: 6). See also Bali’s due account provision in Guideline 11; participatory provisions regarding legislation, policies, plans and programmes in Guideline 13; and justice clauses requiring that any natural or legal person can access “a review procedure before a court of law or other independent and impartial body” if they think an information request has been denied unreasonably (Ibid: 7-8).

‘global Principle 10’ treaty, but the risk is that these non-binding aspirations, issued by UNEP, may duplicate Aarhus’ work under UNECE. The Guidelines were adopted by governments at the 11th Session of the UNEP Governing Council and Global Ministerial Environmental Forum, to “accelerate action in terms of implementing Principle 10” (UNEP 2011: 3). They evince “willingness by Governments to more thoroughly engage the public at all levels to protect and manage the environment” (Ibid: 3). It is telling that they were issued in the same year as Aarhus MoP4’s Chisinau Declaration, and both make similar demands.¹⁷³ The Guidelines’ success is to have opened the procedural trinity up to the world, ensuring that it is not confined to the UNECE region. Thus Bali’s key achievement is to have raised global awareness, and once again placed Principle 10 on the global agenda. In some instances, it surpasses Aarhus’ ambitions, augmenting – but not legally codifying – the green transparency regime.¹⁷⁴ However, for Krämer “there is no chance in the foreseeable future of a global agreement” on Principle 10 (2012: 101). He claims that progress towards such a treaty “suffers from the reluctant position of the US” (Ibid: 101). But this is not to deny civil society’s enthusiasm for a global Principle 10 treaty, even if it is tempered by practical doubts about its feasibility.¹⁷⁵

¹⁷³ Chisinau acknowledges that “our work in implementing the Aarhus Convention is paving the way for a universal application of Principle 10...[W]e offer to share our experience with all countries that wish to join the Aarhus family, to replicate its achievements or to be inspired by this most ambitious venture in environmental democracy” (UNECE 2011a: 5).

¹⁷⁴ Guideline 17 requires that the public has access “to a court of law or other independent and impartial body or administrative procedures to challenge *any* decision, act or omission by public authorities or private actors that *affects the environment* or allegedly violates the *substantive* or procedural legal norms of the State related to the environment” (UNEP 2011: 8; emphasis added). This is more explicit and robust than Aarhus in its concern for substantive environmental protection and domestic law. Aarhus’ comparable provision is Article 9(3), stipulating that “members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment” (UNECE 1998: 13). Article 9(3) omits the terms ‘substantive’ and ‘*any* decision’, and is therefore less robust.

¹⁷⁵ During embedded work, some senior delegates claimed that simply opening initial negotiations for a global Principle 10 treaty would conjure ideas and ambition within the diplomatic community (F15). One participant indicated that political appetite is lacking: “Some of the countries who would

Finally, practical impediments weaken Aarhus' normative potential. What appears, in rationale, a deeply cosmopolitan, even revolutionary regime is afflicted by 'real world' difficulties. As with pillar three, money is a problem. The pluralist barrier of state consent manifests itself here: Aarhus' voluntary contribution scheme, whereby Parties voluntarily finance the management, organisation and staffing of the Convention, institutional architecture and events, is its severest practical impediment (UNECE 2013b: 23). The global financial crisis compounded "the limited human capacity of Parties" (Ibid: 24). Unpredictable, unstable financing exacerbates the Secretariat's staffing and workload problems, which will only be solved by robust, long-term funding, affording predictability and sufficient time to budget effectively. During embedded work, financing recurred as the severest practical impediment to Aarhus' effectiveness (F21). Delegates lamented a high degree of unpredictability and irregularity in respect of contributions. Large contributions were allegedly made late in fiscal years, worsening an already "erratic pattern of contributions" (F21). Financial burden-sharing between Parties was said to be inequitable (F21). Embedded work elicited dissatisfaction with disproportionate reliance on a minority of contributors (F21). Calls were made for fixed minimum contributions; robust (if not mandatory) budgetary regulations; and even a minimum (and indeed miniscule) USD 500 contribution per Party (F21-22).

most likely be in favour...already either have a regional instrument with Aarhus – so they don't want to invest political time in it – or they're on the brink of negotiating a regional instrument in Latin America...And the other countries, well, they're the ones who are mainly resisting it. So it's quite difficult to build political support around this idea" (P16).

Cognitive Potential

Regimes with a strong cognitive dimension seek to understand problems, scope feasibility of solutions, and facilitate research thereupon. The cognitivist logic is that “the more regimes engage in assessment, monitoring, scientific research, implementation review, and reviews of the adequacy of existing commitments, the more likely improvements in the quality of consensual knowledge become” (Breitmeier 2006: 200). Evidence indicates a strong degree of cognitive potential in the Convention. A recent UNECE study claims:

Regardless of the type of body established, the important functions of its work are in two main areas: information exchange from the perspective of advancing implementation of the Convention; and preparing from an expert or political perspective the groundwork for decisions to be taken by authoritative bodies (UNECE 2013b: 31).

Knowledge exchange is a central function of all bodies established by Aarhus. Indeed, central to its cognitive function is the national reporting process¹⁷⁶, offering what Mitchell terms “compliance-oriented information” (1998: 109). This helps assess the degree to which Parties effectively fulfil their duties. Such intra-regime transparency safeguards “compliance, effectiveness, and the ability to assess both...[providing] the foundation for a regime to ‘do well’ as well as to ‘know how well it is doing’” (Ibid: 111). A recent UNECE report found that governments deemed this reporting process “one of the most important aspects of the work of Convention bodies” (UNECE 2013b: 22). Implementation reports enable (a) Parties to monitor each other, hold each other accountable, and assess the

¹⁷⁶ See Article 5(4): “Each Party shall, at regular intervals not exceeding three or four years, publish and disseminate a national report on the state of the environment, including information on the quality of the environment and information on pressures on the environment” (UNECE 1998: 8). National implementation reports are deposited at: <http://apps.unece.org/ehlm/pp/NIR/>.

degree to which their counterparts are legitimate members of the Aarhus community; (b) Parties to share best practice; and (c) civil society to monitor Parties and hold them accountable. But NGOs have raised concerns that national reports may not always offer an accurate account of implementation (UNECE 2005b: 9). There is a risk of greenwashing. At MoP3, in 2008, the secretariat identified problems surrounding “the late submission of many reports and the poor linguistic standard of some of them” (UNECE 2008b: 10). Also at MoP3, European Eco-Forum claimed that “the process of preparing the reports was not always transparent”, voicing concern “that only eight Parties had submitted their reports on time, that many Parties had submitted reports with a significant delay and that six Parties had not submitted a report at all” (Ibid: 11).

Moreover, at MoP4, in 2011, it was “noted with regret that the majority of Parties had not submitted their reports by the deadline” (UNECE 2011b: 6). State consent has thus gone nowhere; state sovereignty remains. If states wish not to cooperate multilaterally, or play by the rules of a treaty, they simply will not. This echoes Mitchell’s finding that “Governments regularly ignore simple and nonintrusive reporting requirements...Data that secretariats do receive is often incomplete or inaccurate” (1998: 112).

An assessment of cognitive potential must also consider a regime’s cross-pollination with other international fora. Abundant and intense interaction between a regime and other fora indicates a high degree of knowledge production and transfer. This is attributable not least to the work of the states that breathe life (politically and financially) into the regime. For Breitmeier et al, “Governments with great scientific, technological and financial resources can influence the production of consensual knowledge...and make use of the resultant knowledge to influence the development of discourses associated with specific regimes”

(2006: 200). Moreover, Böhmelt et al find that stronger transnational ties between regime actors, whether state or non-state, create denser regime networks, bolstering propagation of norms and institutionalisation of rules. Such strong ties and dense networks aid “the transmission of information about interests and intentions, and...promote a common understanding...[which] can...help reduce uncertainty, increase trust and facilitate the development of mutually accepted norms” (2014: 20).

With this in mind, Aarhus fulfilled Paragraph 10(g), Objective II.7, of its 2009-2014 Strategic Plan, recommending that Parties, participating in “international policymaking and... national implementation activities, achieve synergies between the Convention and other international environmental and human rights agreements” (UNECE 2008e: 7). A recent UNECE report applauds the value of “existing, well-worn pathways for...joint activities with partner organisations...[which can] be ‘paved’ through additional investment and dedication of resources” (Ibid: 24). Aarhus has garnered strong working relationships, for instance, with the Convention on Biological Diversity and the Cartagena Protocol (UNECE 2013b: 22). It was noted at MoP4 that all Aarhus Parties were also Cartagena Parties, affording a “unique opportunity for joint implementation and mutual supportiveness of the two instruments... The Aarhus Convention and CBD secretariats had established a strong collaborative relationship in recent years, undertaking a number of successful joint activities” (UNECE 2011b: 9).

Aarhus also shares synergies with the Espoo Convention on Environmental Impact Assessment in a Transboundary Context (Fitzmaurice 2010: 53). In December 2007 a workshop convened experts from Aarhus and Espoo, enabling them to share best practice and strengthen their bonds. Workshop participants “felt that a united approach to future

work...comprising the two Conventions' experts was to be commended" (UNECE 2008b: 8). This is laudable: both Conventions are administered by UNECE in Geneva. Moreover, whilst all but four Aarhus Parties are also Espoo Parties, with the exceptions of Georgia, Monaco, Tajikistan and Turkmenistan (UNTC 2014a, 2014b), all but three Espoo Parties are Aarhus Parties, the exceptions being Canada, Russia and the USA (Ibid). Such congruence between the Conventions' Parties is vital for cross-pollination and knowledge transfer, especially given that official guidance documents on public participation in Espoo "resemble the Aarhus Convention provisions on public participation in decisions on specific activities, with respect to timing, sufficient time-frames, opportunity to comment and the duty to take...comments into account in the final decision" (Ebbesson 2011: 250).

Moreover, a primary tier of partners, enjoying strong connections with Aarhus, includes the Organization for Security and Co-operation in Europe (OSCE), UNEP, the United Nations Development Programme (UNDP) and Regional Environmental Center. This tier is heavily involved in capacity-building. Since 1999, the OSCE has worked with the Aarhus Secretariat to promote ratification and implementation by its member states, by "organising awareness raising campaigns...seminars and supporting the establishment, functioning and growth of environmental NGOs" (Skrylnikov 2008:3). REC and OSCE share strong links themselves.

Aarhus' cognitive functioning is attributable, in no small part, to its specialist task forces. Recently, a UNECE report was commissioned to evaluate the current functioning and implementation of the Convention (UNECE 2013b). It concluded that the specialist task forces "provide a forum for the free exchange of ideas. The task force format was generally praised as facilitating discussion, and particularly for giving greater room for non-state

actors to speak” (2013b: 28). The now-defunct Task Force on Public Participation in International Forums should be discussed with this claim in mind. Its value manifested itself at the UNFCCC’s Copenhagen conference in 2009. After Copenhagen, UNFCCC asked the Task Force for advice, as Copenhagen had allegedly failed partly due to poor participation. The Task Force was used as a knowledge repository able to disseminate best practice to very high profile entities. A recent UNECE report writes that, as a result of this example, the Task Force “had the potential to be a service provider to external MEA partners, and reportedly the demand for it had been increasing” (UNECE 2013b: 26). Indeed, an assessment of the fulfilment of Aarhus’ 2012-2014 work programme observes that “Requests by other international forums for advisory support from the secretariat are *noticeably* increasing” (UNECE 2013g: 10; emphasis added). An international civil servant, representing an IGO, corroborated this: “One of our principles...is that we have to be open and transparent. We try to live up to that. I guess we take our cue from the Aarhus Convention...certainly, it’s a matter of public interest, of interest to policymakers, and it should be” (P8).

This is not to deny that some stakeholders believe that cross-pollination can be improved. During embedded work, some delegates criticised Aarhus for allegedly insufficient cross-pollination with other international fora (F16). Critics claimed that non-environmental organisations were relatively unaware of the Convention (F16). One delegate observed “great difficulty for Aarhus focal points to get in contact with their counterparts, foreign ministries for instance, and to make these people aware of their Aarhus responsibilities” (F16). Another complained that state officials in non-environmental roles are often oblivious to Aarhus: “It’s not a case of them being against it, but being silent” (F18). This was corroborated by a civil servant who deemed knowledge transfer a key challenge,

stating that administrative awareness of Aarhus, and the duties of states and authorities, very much depended on the department or body in question (P9). The implication is that knowledge disparities exist between governments, and also between individual ministries and regulatory authorities.

Institutional Potential

The Strategic Tier: Meeting of the Parties and Working Group of the Parties

The MoP¹⁷⁷, a regime's "highest authority" (Andresen 2007:331), is critical to its potential. Its roles include internal decisionmaking, codification of new substantive duties, oversight of implementation and compliance, regulation of non-compliance and instigation of relations with other actors in the diplomatic arena (Churchill and Ulfstein 2000: 626). The MoP is Aarhus' main governing body¹⁷⁸, established in Article 10.¹⁷⁹ It is a forum where Parties review and seek to improve the Convention's provisions.¹⁸⁰ Noting the cognitive element above, the MoP is a forum where Parties "Exchange information regarding experience gained in concluding and implementing bilateral and multilateral agreements or other arrangements having relevance to the purposes" of Aarhus (UNECE 1998: 13). It is

¹⁷⁷ MoPs are also called CoPs (Conferences of Parties).

¹⁷⁸ The following MoPs have been convened to date: MoP1, Lucca, Italy (21-23 October 2002); First Extraordinary MoP, Kyiv, Ukraine (21 May 2003); MoP2, Almaty, Kazakhstan (25-27 May 2005); MoP3, Riga, Latvia (11-13 June 2008); Second Extraordinary MoP, Geneva, Switzerland (19 and 22 April 2010; 30 June 2010); MoP4, Chisinau, Moldova (29 June-1 July 2011); MoP5, Maastricht, Netherlands (29 June- 2 July 2014)

¹⁷⁹ Article 10(1) requires an ordinary MoP to "be held at least once every two years". See Article 10(2): "At their meetings, the Parties shall keep under continuous review the implementation of this Convention on the basis of regular reporting by the Parties" (UNECE 1998: 13).

¹⁸⁰ See Article 10(2)a (Ibid: 13).

an arena where Parties, plus UNECE, collaborate with others to improve the regime.¹⁸¹ Further, it is incumbent on the Compliance Committee to submit its recommendations to the MoP, so that the latter can make decisions thereupon, and operationalise the solutions to ensure that Parties are in compliance.

To this end, the recent UNECE report, evaluating Aarhus' current functioning and implementation, is clear: "The decisions of the MoP and the findings of the Compliance Committee are the most important for the implementation of the Convention" (UNECE 2013b: 36). But whilst the MoP "drew particularly strong scores on transparency and opportunities for participation", one person "questioned the representativeness of the NGO observers" (Ibid: 8). This resonates with the findings discussed in Chapter 6 of the present investigation.

The Working Group of the Parties was created at MoP1 to oversee Aarhus' intersessional work between MoPs, and the implementation of the work programme. Its mandate is to prepare for MoPs; oversee the work of ancillary bodies; review Aarhus' amendment requirements; make recommendations to the MoP that aid implementation, and undertake other duties requested by the MoP. The recent UNECE assessment of Aarhus' present functioning finds that whilst "a few Government respondents are strongly opposed to the Working Group...playing a role on the national level" (Ibid: 9), it is generally welcomed by stakeholders.

¹⁸¹ See Article 10(2)c: In the MoP, Parties "Seek...the services of relevant ECE bodies and other competent international bodies and specific committees in all aspects pertinent to the achievement of the purposes of this Convention" (Ibid: 13).

The Operational Tier: Bureau, Thematic Task Forces and Secretariat

The Bureau, created at MoP1, is elected by the MoP. It meets more regularly than the strategic tier. The recent UNECE evaluation of Aarhus' functioning deems it a "key decisionmaking body" (Ibid: 10). It is an interesting entity that has assumed the character of a 'rapid response' unit, which can address implementation difficulties of immediate concern, 'in the field'. At its 29th Meeting in 2012, the Bureau decided that

...in exceptional situations that might imply non-compliance with Article 3, Paragraph 8...the Chair of the [MoP], after consultation with other Bureau members, would send a letter to the Party concerned soliciting information and clarifying the matter. The procedure is intended as a *prompt reaction* to any *severe incidents* that might entail non-compliance with the Convention (UNECE 2013a; emphasis added).¹⁸²

Aarhus' infrastructure also comprises thematic task forces, which are highly valued by practitioners. The recent UNECE assessment of Aarhus' current functioning notes: "Thematic bodies are perhaps now the main mechanism for progress during intersessional periods, and their role as nodes for reporting and as facilitators for horizontal reporting have been strengthened over time" (2013b: 32). This indicates that the task forces contribute to Aarhus' cognitive potential, although one should not overlook a specific response, to the UNECE investigation, which complained of "the limited participation of governments in Task Force activities" (Ibid: 15). Indeed, task forces are more informal than strategic tier bodies. They are issue-specific forums where state and non-state actors meet as "experts engaging in collegial discussion on solutions to concrete problems

¹⁸² This 'rapid response' role has been applied in the Honcharenko case, discussed in Chapter 9.

without the constraints of political hierarchy considerations” (UNECE 2013b: 28). Embedded work involved participation in task force meetings. The degree of frank, spontaneous interventions made by state and non-state actors alike was striking. Often, the ‘atmosphere’ was less akin to diplomacy, and more akin to a university seminar. NGO delegates routinely contravened a time limit on interventions. Such interventions received candid responses from state delegates who appeared to be taking civil society concerns as seriously as the remarks of state envoys. The present writer is not the only one to have detected such a sense of candid dialogue in Aarhus proceedings.¹⁸³

Indeed, embedded work found clear signs that Aarhus seeks to ‘lead by example’, ‘living’ its ethos of participatory equality, transparency and democracy in its internal machineries and processes. Work in task force meetings, in particular, revealed the desire – on the part of Aarhus’ staff, Parties and broader stakeholders – to ‘live out’ the Convention’s concern for dialogue, transparency and participation. Civil society enjoyed a clear, amplified voice. Its delegates had a confident, charismatic presence on the international stage, quite literally. They truly were heard and engaged by Parties. When pre-drafted statements were issued by government representatives, they were nearly always addressed informally by civil society. One particular session (F8) is recalled where a civil society advocate gave a lengthy oration, without recourse to notes, and was respectfully heard out by the conference. The advocate, despite exceptional professional and academic acumen, spoke in colloquial lay English, apparently oblivious to the occasion’s diplomatic formality. No expressions of discontent or unease were noted in this author’s fieldwork coverage. The dialogue was striking in its candour (F8). The present writer doubts whether such overt

¹⁸³ A researcher agreed: “The best development is that these different actors are sat around the same table. They’re actually talking...there is dialogue. And I think this is very good” (P20).

informality would surface in other multilateral proceedings. These fieldwork findings are corroborated by the recent UNECE report, deeming Aarhus a “leader among international institutional arrangements in the extent to which members of the public and their organisations have access to, and the ability to participate in and influence the outcomes of, Convention bodies” (UNECE 2013b: 23).

Industry, however, is underrepresented in Convention proceedings. The recent UNECE assessment of Aarhus’ functioning observes a “mixed record of industry participation in the MoP, while in other bodies participation...was considered a ‘failure’, even though some bodies made an effort to reach out to industry representatives” (2013b: 23). This corresponds with interview findings discussed earlier. Embedded work identified one industry delegate at the first event, and three at the second. Thus the proportion of industry delegates in relation to the total delegation was miniscule.

In reference to the secretariat, research for this chapter found that Aarhus’ secretariat confirms prevalent notions of autonomous international bureaucracies.¹⁸⁴ Fieldwork found that the secretariat seeks to achieve a vast number of different objectives, with modest

¹⁸⁴Secretariats are international bureaucracies, involved in “preparing draft decisions...assisting states...and receiving reports...The secretariat...establishes liaison with [other] organisations” (Churchill and Ulfstein 2000:627). Such bureaucracies are not international organisations. IOs have “three elements: a normative framework, a group of member states, and a bureaucracy as administrative core” (Bauer et al 2012:28). International bureaucracies are state-sanctioned entities with a “permanence and coherence...beyond...direct control of single...governments...that act in the international arena...The capacity of a bureaucracy ...is vested in an...apparatus with a hierarchically organized group of...civil servants that have an externally defined mandate and resources, explicit organizational boundaries, and a set of formal rules...within their policy area” (Ibid:28). Secretariats have influence, initiating conferences and affecting the “implementation, revision, adaptation, or renegotiation of existent institutions” (Ibid:34). Secretariats often stretch “their mandate...even when they...lack an operative mandate...There even seems to be a general tendency for international bureaucracies to develop operational activities and capacities even when their original mandate and function do not provide for it” (Ibid:35).

resources. The recent UNECE report confirms this: “The most common concern...about the Secretariat was the inherent limitation of resources and the excessive demands made on [it]...This was partly attributed to a lack of steady financing...Some interviewees decried the inability to have dedicated staff to service each Convention body (UNECE 2013b: 19). Interestingly, some of the report’s participants attributed the secretariat’s problems to its very belonging to UNECE. It was found that “the secretariat, while nominally responsible to the Parties, could not avoid split lines of accountability and a substantial administrative burden, as the entire support infrastructure was dependent on the United Nations” (Ibid: 19). From this angle, the UN is the *problem* causing, rather than the *solution* to, the secretariat’s woes. Myriad factors may underlie this. Heavy bureaucratic burdens have been attributed to international civil service work in the UN; staffing uncertainties are compounded by the unpredictable financing discussed earlier; and overreliance on short-term employment contracts precipitates a high rate of personnel turnover. These practical difficulties echo Biermann and Pattberg’s conclusion that the “problem structure and internal factors of organizations such as leadership and staff composition can explain much variation in the influence of international bureaucracies” (2012b: 8). Such difficulties also add credence to Churchill and Ulfstein’s view that, as a result of many MEA staff being UN employees, the UN “must...have the right to direct officials in personnel and administrative matters. Hence, it may...instruct officials in how to carry out their work. The interface between the instructions to the secretariat from the [MoP] and its subsidiary bodies, and instructions to officials from the host organisation, may obviously harbour a potential for conflict” (2000: 635). Of course, these difficulties must be balanced against the benefits of Aarhus being managed under UNECE’s auspices: the Palais des Nations’ operational infrastructure is world class, and abundant networks of formal and informal influence flow through it. The UN offers a well-travelled path for instigating and

administering multilateral diplomacy and international law. Moreover, myriad permanent missions to the UN are stationed in Geneva, access to which may decline if Aarhus seceded from UNECE. Put simply, Aarhus was signed as a UN treaty, and will remain one.

The Tactical Tier: Aarhus' Compliance Mechanism

The independence, transparency and NGO involvement in the Convention's novel compliance mechanism represent an ambitious effort to bring democracy and participation to the very heart of compliance itself.

Kravchenko (2007: 49)

It is widely recognized that the Aarhus compliance mechanism is legally innovative compared to other multilateral environmental agreements.

Mason (2010: 19)

This section examines Aarhus' compliance mechanism and the Compliance Committee in particular. The mechanism is assigned to the tactical tier as it is responsible for judging, at the micro-level, whether a state – in one specific case – has acted in (non)compliance with the Convention. Two parts follow. The first discusses the mechanism's solidarist potential, taking reference to its norm enforcement capacity and ability to empower individuals wishing to hold states accountable for their improprieties. The second assesses the practical impediments to such norm enforcement and human empowerment, and discusses the pluralist realities that temper the tactical tier's potential.

Norm Enforcement and Human Empowerment

Aarhus' tactical tier comprises the compliance mechanism¹⁸⁵, adopted by Decision I/7, MoP1 (Koester 2007: 83). Its procedures echo O'Neill's finding that "If the agencies in control of the regime or powerful member states have the ability to detect and punish non-compliant behaviour, or at least can make a credible threat to do so, compliance is more likely" (2009: 118). The Compliance Committee (a) considers communications regarding compliance; (b) prepares, at the MoP's request, reports on compliance; and (c) monitors, assesses and facilitates compliance (UNECE 2010: 6). On receiving an allegation of non-compliance, the Committee (a) investigates the case; (b) finds whether or not a Party acted in compliance; and (c) makes recommendations to ensure compliance.

The first Committee was elected in October 2002. The mechanism may be triggered in four ways (UNECE 2010: 2): (a) a Party may make a submission about compliance by another Party; (b) a Party may make a submission concerning its own compliance; (c) the Secretariat may make a referral to the Committee; or (d) members of the public may make communications pertaining to a Party's compliance. In the overwhelming majority of (circa 90) cases, the mechanism has been triggered by the public. Only one allegation of (Ukrainian) non-compliance has been made by a Party (Romania); that was in 2004. One participant remarked that in this instance, "there was a kind of political difference of opinion between the two countries...The fact that there was...a commercial dispute in the

¹⁸⁵ See Article 15: "The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention" (UNECE 1998: 16).

background made it easier for Romania to complain. So if you're relying on this kind of trigger, then you have very few cases" (P16). Never has the Secretariat referred a case; never has a Party referred itself.

After an allegation of non-compliance is made, the Secretariat forwards a letter to the Party concerned, which should, within five months, submit statements clarifying the matter and responding to the allegations (Ibid: 18). If the Committee admits an allegation to its review process, the subsequent discussion involves a formal hearing between the complainant and accused (Ibid: 20). This resembles a court proceeding, involving a sequence of presentations by the complainant and accused; Committee questions; responses; observers' comments; and closing remarks by the complainant and accused (Ibid: 20).

When the Committee has sufficient understanding of the matters, it will prepare draft findings and recommendations (Ibid: 20). It will draw conclusions on whether or not the Party is in compliance. The draft findings will be sent to the complainant and accused, with an invitation for response. Thereafter, the draft will be reviewed, amended if necessary, and finalised. The MoP takes the final decision on measures to ensure full compliance, and may mandate the Committee to monitor implementation (Ibid: 22). Indeed, the MoP is "the final arbiter as to whether or not there is a case of non-compliance" (Kravchenko 2007: 35).

The Committee is responsible for submitting its compliance reports to the MoP. The MoP may choose from various measures to ensure compliance. One or more of the following may be adopted (UNECE 2010: 7):

- 1 Advice and assistance to Parties regarding compliance and implementation.

- 2 Recommendations to the Party concerned.
- 3 Request the Party to submit a strategy and timeframe for achieving full compliance.
- 4 Recommend measures to address matters raised by the public.
- 5 Issue declarations of non-compliance.
- 6 Issue cautions.
- 7 Suspend the rights and privileges accorded to the Party under the Convention.
- 8 Take other non-confrontational, non-judicial, consultative measures.

The compliance mechanism's *modus operandi* coheres with O'Neill's view that "Regime members are more likely to comply in a social setting when they perceive that they may suffer significant social sanctions or loss of reputation within that setting if they are seen not to comply" (2009: 118). In reference to such social legitimacy, Churchill and Ulfstein identify benefits in using compliance mechanisms rather than courts or formal dispute settlements. First, MEA noncompliance has consequences for multiple actors, both states and civil society. As cases of noncompliance "affect all parties equally rather than any particular party...they should preferably be addressed in a multilateral context, rather than in a bilateral dispute settlement procedure" (Churchill and Ulfstein 2000: 644). Second, such mechanisms are informal and dialogue-oriented, encouraging "resolution of compliance problems in a cooperative, rather than an adversarial, manner" (Ibid: 645). MEA compliance mechanisms are thus more oriented towards support than discipline. Kravchenko would agree with Churchill and Ulfstein:

Recent shifts in compliance and implementation...move away from traditional confrontational methods of enforcement...(i.e. dispute settlement, arbitration and countermeasures, including sanctions)...toward a more flexible, non-confrontational and cooperative approach. The

traditional methods have not proved to be effective in the field of [environmental] protection...while multilateral consultative processes, compliance assistance and capacity-building are more effective (2007: 28).

Indeed, one diplomat was keen to stress that Aarhus' Compliance Committee is a non-confrontational organ, focused on support and facilitation rather than punishment. This participant stated that Committee members "never say 'violating'" but rather declare that "the state is in non-compliance" (P4). One recalls Pedersen's claim that the Compliance Committee offers "an important and inventive approach to the supervision of international agreements" (2008: 97). Kravchenko would agree with Pedersen, identifying three features of the mechanism that render it unique:

The Aarhus Convention's compliance mechanism includes several significant features including: (1) the ability of NGOs to nominate experts for possible election to the CC; (2) the requirement that all Committee members be independent experts rather than representatives of Parties to the Convention; and (3) the right of any member of the public and any NGO to file a communication with the Committee alleging a Party's noncompliance (Kravchenko 2007: 1).

Pedersen and Kravchenko are not alone in praising the compliance mechanism.¹⁸⁶

¹⁸⁶ See Krämer: "The Aarhus Convention has produced results in Europe, in particular owing to its very active Compliance Committee. This Committee made a number of recommendations on the understanding and interpretation of the Convention that were without exception adopted by the Meeting of the Parties" (2012: 98).

Human empowerment is evident in the provision for citizens to directly refer allegations of non-compliance to the Committee. UNECE deems the mechanism “unique in international environmental law, as it allows members of the public to communicate their concerns about a Party’s compliance directly to a board of independent experts, the Compliance Committee, who have the mandate to examine the merits of the case” (2010: 2). NGOs can trigger compliance review “like any other member of the public” (Ibid: 28). Affording citizens the chance to directly submit communications is unique. This is substantiated with one participant’s claim that “with other international treaties, the compliance mechanisms are so weak in the sense that the only way to trigger them is by one Party complaining about another Party” (P16). As Dellinger notes, “MEAs often only allow such submissions to be made by the Parties themselves or, in some cases, by expert review teams” (2012: 323). Communicants need neither legal representation at Committee hearings, nor legal assistance when preparing submissions. This encourages participation by those with limited finances (Ibid: 324). For Morgera, “Although this is already known in the field of human rights, it is the first time that an MEA allows members of the public, including NGOs, to make communications to a committee on cases of alleged non-compliance” (2005: 140-141). To cite one example, the Montreal Protocol, underpinning the ozone regime, only accepts communications from NGOs if they are forwarded by the Convention secretariat (Kravchenko 2007: 20). Further, neither the Kyoto nor Cartagena Protocols allow individual citizens to trigger their review mechanisms by submitting personal communications (Ibid: 20). Also, whilst Espoo has robust participatory mechanisms, its Implementation Committee does not accept allegations from individual citizens (Ibid: 20). Of particular value is the fact that this body resolved to monitor the progress of Aarhus’ compliance mechanism, which has “become a direct precedent for the proposal of almost

identical provisions for the Protocol on Water and Health, and it may eventually become the same for the Espoo procedure as well” (Ibid: 23).

Human empowerment is also evident in the Committee’s openness to public participation. According to the official handbook, “hearings and discussions on...cases are in general open to the public, who may participate as observers, as well as to the parties concerned... Participation is...understood in the sense in which the concept is enshrined in the Convention, comprising... the right to comment, the right to be heard and the right to have comments taken into account by the Committee” (UNECE 2010: 12-13).¹⁸⁷ For Fitzmaurice, Aarhus “is unique, as in no other compliance procedure is the participation of NGOs provided for” (2010: 49). In IEP, the Committee “is the only one with the active participation of civil society” (Ibid: 56). Its dialogic space, open for complainants to challenge contraveners ‘face-to-face’, makes it “well equipped to promote legitimacy and justice in environmental decisionmaking” (Ibid: 57). Indeed, “Any member of the public may attend meetings of the CC and offer interventions and observations concerning the cases under consideration” (Kravchenko 2007: 5). The Committee is thus a forum in which compliance cases can be interrogated by officials and citizens together. This corresponds with Dellinger’s observation that the Compliance Committee “has taken the lead among international agreements in opening its meetings to observers, including those from the nongovernmental sector. The purpose of this is to lead by example. A treaty that calls for public participation by governments should also allow insight into its own internal mechanisms” (2012: 324). These remarks also resonate with the views of a solicitor, who stated that a key achievement of the Convention was the use of the compliance mechanism

¹⁸⁷ See also Koester: “Generally speaking, all meetings of the CC are open to anyone wishing to attend” (2007: 85).

by a wide diversity of citizens and civil society groups, who have been able to “bring about significant changes in countries” (P3). The foregoing also echoes the views of a diplomat, who was particularly pleased with the Committee’s participatory provisions, citing as pioneering the capacity for citizens and NGOs to directly allege non-compliance (P4). This informant applauded the provision for public observation of Committee proceedings, remarking that observers “certainly have their contribution”, asking questions and voicing their opinions “from the floor” (P4).

Committee findings have “the character of a dialogue...based on full transparency. It may be also mentioned that all documents kept by the Compliance Committee are in the public domain and cannot be kept confidential” (Ibid: 60). It is noteworthy that the Committee discloses as much data, pertaining to cases, as possible on its website. For Krämer, “this kind of practice is completely new for judicial procedures” in Europe (2012: 98). In the spirit of transparency, “Contributions, information, positions and requests from NGOs and members of the public are officially registered with a view of spreading the information and giving everyone a chance to participate with the same level of information” (Koester 2007: 86). Indeed, Kravchenko notes that public access to Committee information is “almost unrestricted” (2007: 5).

The element of dialogue is also evident in the Committee’s functioning. Typically, the Committee’s “findings have to be agreed with both...the country and the communicant” (P12). Compliance, in the Aarhus regime, is consensus-oriented. It attempts, at least, reconciliation between the complainant and accused. In theory, such an air of reconciliation would foster a more collegial and collaborative regime. An NGO manager was of the opinion that dialogue, fostered in the compliance mechanism, was a cardinal

achievement of the Convention. They suggested that dialogue between the complainant and accused

...is a very important tool in our hands. And also governments' hands, because they are...sitting in one room...They can discuss things. And it also leads sometimes to changes in attitude. Changes maybe also in legal issues. And for Austria, they started to think about introducing a different way for access to justice. I think it really helps to improve the situation (P12).

Under this logic, the actual *practice* of the Compliance Committee is as important as its findings and solutions. By convening the complainant and accused in one room, hearing both sides of the case, and garnering a candid exposé of the case, the literal and figurative barriers between the complainant and accused are overcome. This is especially crucial where the complainant is a lay citizen, and the accused a state or public authority. Whether democratic or autocratic, the state – or rather its delegates – will have to engage in an orderly, diplomatic and candid dialogue. This enables misconceptions to be quelled, and hopefully a degree of empathy to be fostered between the complainant and accused. In such circumstances, reconciliation between both parties will hopefully be more likely.

Solidarist norm enforcement is evident in the Committee's attempt to serve the Convention as a quasi-court. Whilst the Committee is not a court, it *is* a robust forum for dialogue between complainants and alleged contraveners, with its own norm enforcement capacity. This claim is corroborated by a lawyer, who likened the Compliance Committee to a court, without portraying it *exactly* as such: "For something to be like a court, you have to have two parties...Other Compliance Committees, for instance the one in the Climate Change Convention, are just operating on the basis of reports submitted by states. And so you

wouldn't describe them as courts. But where you have...a *dispute*, it's something like a court" (P19). The lawyer continued, suggesting that in a formal court proceeding,

...each side would submit their written pleadings, first of all. You would have a complaint from the individual, you would get a response from the state [in issues of Party compliance], and you would have a hearing where the individual would present their argument, and the state would present their argument...That's what we'd anticipate in the UK (P19).

In this respect, Committee proceedings strongly resemble formal court proceedings.

Moreover, the Committee makes its own jurisprudence, rendering it court-like but not a court *per se* (see Andrusevych et al 2011). The "jurisprudence relating to the interpretation of the Convention" accrues from "a rich discussion, where the participation of the public can be crucial" (UNECE 2010: 29). Kravchenko notes that the Committee and MoP are now "interpreting the Aarhus Convention through their decisions and building a body of case law" (2007: 5). Committee findings set precedent: Aarhus' case 'law' stimulates norm enforcement inside domestic jurisdictions, guiding Parties' interpretation and application of the Convention. For Krämer:

While the Committee is not a court and does not pronounce judgements, its findings...have a very considerable influence on the interpretation of the Aarhus Convention. This influence is transboundary in that it also affects the interpretation and application of the Convention in those states that are not directly involved in the specific case...The influence of the Committee's findings, therefore, goes beyond the influence of a judgement by a national

court, which is limited in Europe to the national legal order within which it is formulated (Krämer 2012: 98).

This observation indicates that the compliance mechanism's norm enforcement capacities are robust. Sovereignty is penetrated by a Committee whose findings influence the way *all* Parties interpret and apply Aarhus. In this respect, Krämer is correct to note that the Committee surpasses the remit of national courts: it helps set a precedent for the entire Aarhus region, and is thus endowed with transnational norm enforcement capacities. Not only have the norms of information access, participation and justice been propagated and institutionalised. They have penetrated domestic jurisdictions, as Committee findings, case 'law' and jurisprudence guide individual states in their domestic environmental decisionmaking practices. This is a vital point, demonstrating Aarhus' capacity for solidarist norm enforcement. Kravchenko would agree with Krämer. She observes that within four years of the Convention's entrance into force, "many countries changed their legislation to comply with the Aarhus Convention" (2007: 32-33). Such claims are reflected in fieldwork evidence. One diplomat concluded that the Committee "is, more or less, like a court of law: except for the sanctions because we are not a court. But we formulate clearly what is compliance and non-compliance; we formulate very clear recommendations to states" (P4).

This sentiment is corroborated by another interview participant, who remarked that Aarhus is "in the phase of having a lot of jurisprudence coming through...And that jurisprudence shows that the Aarhus Convention's findings are being taken note of. And, with jurisprudence at the national level, you have reference to Compliance Committee findings. So I think the Compliance Committee is taken seriously" (P16). Further, when the present

researcher, interviewing a barrister, proposed that the compliance mechanism demonstrates Aarhus' ability to penetrate sovereignty and yield international influence on the domestic realm, their response was clear: "Yes, very good. That's very powerful. That's happening" (P21).

The Committee is also court-like by virtue of its "contradictorality" principle (P4), which this study interprets as the principle of adversariality. Put simply, both the complainant and accused have an equal chance to hear and be heard. Both sides of the case have an equal chance to articulate their claims on an equal podium. The formal hearing was portrayed by the diplomat as an "oral exposé", from which the truths of the alleged instance of non-compliance will be revealed (P4).

Norm enforcement often entails 'soft' intervention in sovereignties. Rather than always sending findings to the MoP for formal sanctioning, the Committee often works by

... 'mildly' persuading Parties... to accept recommendations, arguing that non-acceptance might force the Compliance Committee to submit its findings and recommendations for a final decision by the MoP. Thus, by accepting the recommendations of the Compliance Committee, and provided that some progress has been made in the meantime, the relevant Party might only be included for reference in the report of the Compliance Committee to the MoP (Koester 2007: 87).

In reference to 'soft' intervention, it should be reiterated that during intersessional periods, between MoPs, the Committee has a suite of tools at its disposal. The Committee is at liberty to (Kravchenko 2007: 30-31):

- 1 Make recommendations to the MoP, as previously discussed
- 2 Advise and assist Parties in relation to their implementation of the Convention
- 3 Make recommendations to the Party concerned
- 4 Request the Party to submit a compliance strategy, and subsequent appraisals
- 5 Suggest measures to the Party to address concerns raised by the public.

Kravchenko observes that “Before stronger measures are considered, all possible *positive* measures encouraging Parties to comply – advice, facilitation and assistance – should be exhausted” (Ibid: 31; emphasis my own).

Solidarism is also evident in the Committee’s membership, comprising individual human experts rather than government representatives. According to Morgera,

The composition of the Compliance Committee is quite unprecedented, when compared with analogous bodies in other [MEAs]. The Committee consists of independent experts as nationals of state Parties or signatories, rather than governmental representatives. Committee members are nominated by state Parties, signatories and NGOs, and elected by the MoP... The fact that NGOs have the right to nominate candidates is quite a novelty (2005: 140).

Committee members are thus not formally affiliated to Parties, and are independent, impartial, and noted for their objective professionalism. Not only are they nominated by Parties, but also by civil society itself. This encourages a richer sense of accountability and legitimacy: real effort is taken to ensure that Parties are held accountable by experts. The nomination procedure is imbued with connotations of democratic checks and balances

seeking to prevent a tyranny of sovereignty. One diplomat praised the Committee for its fair, representative membership (P4). It is worth noting that the present Committee comprises one citizen of an advanced democracy (Sweden) and six nationals from non-Western European countries (Kazakhstan, Bulgaria, Czech Republic, Romania, Armenia and Poland). This is not coincidental. The diplomat applauded this apparent positive action, remarking that “the problems are *there*” (P4), and therefore warrant a Compliance Committee with intimate understanding and experience of the environmental difficulties particular to transition democracies and non-Western European territories.

The recent UNECE assessment of Aarhus’ current implementation and functioning drew positive conclusions about the mechanism: 72% of its participants found the Committee’s findings “‘very helpful’, higher even than the decisions of the MoP...Interviewees highlighted the Committee’s positive effect in clarifying the Convention’s obligations, both through findings of non-compliance as well as findings that Parties were not in non-compliance” (UNECE 2013b: 18). Embedded work found that the practitioner community considered the Compliance Committee to be Aarhus’ flagship organ, not least given the circa 100 cases that have been resolved, addressed or brought to the Committee’s attention (F3). A number of landmark cases resurfaced during embedded observation, including C11 (Belgium), C18 (Denmark), C48 (Austria), C50 (Czech Republic) and C61 (United Kingdom).

Impediments to Norm Enforcement and Human Empowerment

The pressing need was recognised at MoP3, in 2008, “to take firm action with respect to Parties that persistently fail to comply with the Convention and do not make efforts to achieve compliance” (UNECE 2008c: 3). A salient risk is that Parties may ignore, avoid, or make mere token gestures towards the compliance mechanism. These concerns are corroborated and shared by Dellinger:

Once cases of noncompliance are brought against them, the true test of whether...[they] wish to follow...arises...[S]ome truly do, whereas others ...refuse to follow their...obligations...It is first...a problem for civil society when Parties do not implement the recommendations...but it is also a problem for the Convention...which is forced to keep track of such implementation for years, at times when the Compliance Committee is seeing an increased caseload (2012: 356).

Whilst “none of the Parties have completely ignored the requests” of the Committee (Koester 2007: 92), Pedersen notes that “Where the Committee finds a party to be in non-compliance...its powers are somewhat limited” (2011: 116). It cannot be denied that “the Committee has no formal enforcement powers over Parties” (Ibid: 116). Its case ‘law’ and jurisprudence indeed set implementation precedent, but it would be untrue to claim that the Committee has a court’s powers to police recommendations in legally binding, sanctionable form. These difficulties are evident in concerns with the lack of ‘follow-up’ activity to monitor a Party’s subsequent compliance work, following a finding of non-compliance. Even if the Committee and MoP issue cautions and recommend robust solutions, “Parties don’t immediately step into line, and there are processes which drag on

for years” (P16). The need for improved follow-up procedures was also raised during embedded work (F12). The prevalent sense, during embedded work, was that even if the MoP acts on Compliance Committee recommendations, and imposes sanctions on Parties, no practical apparatus for compulsion or coercion exists. Nothing can be done to force a Party to change. Even expulsion from the Convention would not have any palpable consequence for the regime or the Parties. An environmental campaigner concluded that whilst Parties often convey superficially pleasing rhetoric, in response to Committee findings and recommendations, they actually undertake the minimum necessary action (P7).

It has been acknowledged that the Compliance Committee is not a court, and that its perceived legal weakness may render it susceptible to abuse and avoidance. This finding coheres with the suggestions of a number of participants. An NGO manager stated: “It’s not a court. That’s for sure” (P12). Rather, the Committee’s role was portrayed as being to “provide findings, which they have found in the course of the investigation” (P12). Those findings indeed have a bearing on the MoP’s recommendations, on informal solutions, and on future applications of the Convention. But it would be misleading to portray those findings as court rulings. They simply are not. A lecturer agreed, claiming that the only substantive improvement for the Compliance Committee would be its transition from *committee* to *court* (P10). This speaker called for “legally binding compliance assurance mechanisms”, claiming: “I don’t understand why, if your rights are infringed in the European Convention on Human Rights, you can apply to the European Court of Human Rights”, whereas a citizen whose Aarhus’ rights have been violated cannot sue in a comparable court (P10). Meanwhile, during embedded work, numerous delegates demanded a compliance mechanism with greater legal powers (F12). One particular

critique was that whilst the MoP can demand a follow-up report from a non-compliant Party, disclosing how it has amended its practices to safeguard compliance, this is not legally binding. If it *was*, and if failure to amend practices incurred punitive action, contravention would decrease. But whilst demanding such reforms is simple, practical difficulties abound. Parties will surely not accept reforms that would punish them in instances of non-compliance and non-follow-up. They will not accept ever more strenuous duties. Indeed, why would they approve reforms that would ultimately curtail their sovereignty, and force them along trajectories that the original Convention did not mandate?

State reticence towards the compliance mechanism may also be attributable to the latter's suspected 'competence creep', the process whereby a body attempts to perform functions or achieve goals that surpass, or fail to correspond with, its remit. Indeed, Koester observes that the Committee "is not restricted to the consideration of legal or factual arguments presented by the parties concerned, and considers itself free to draw conclusions that go beyond those presented to it" (Ibid: 87). The Committee has declared that it retains "the possibility when determining issues of non-compliance to take into consideration general rules and principles of international law" (Ibid: 87). This surpasses its task of determining whether a Party, in a particular case, has acted in compliance or not. Moreover, the Committee demonstrated competence creep by judging, for instance, that "the fact of a matter being under consideration by another international review procedure would not in itself prevent the Compliance Committee from dealing with the matter" (Ibid: 87). These observations add credence to Dellinger's finding that "the Committee has emphasised that the Parties should observe both the letter *and* the spirit of the Convention" (2012: 353; emphasis added). These observations also match the views of one participant in the recent

UNECE assessment of Aarhus' current functioning, calling for the Committee's right "to make findings and recommendations even in a case where the action of the Party was found to be technically in compliance" (2013b: 18).

One participant was concerned that the Committee's alleged competence creep may cause a potentially unsanctioned erosion of sovereignty. They indicated that the Compliance Committee has, in some instances, made recommendations to Parties that purportedly either (a) are not pursuant to specific provisions of the Convention or (b) have no currency for the Convention at all (P omitted). Similar sentiment was expressed by a solicitor, who argued that the Compliance Committee "should be cautious about its role" (P13). The speaker stressed that courts exist to prompt the specifics of a legal case, redress grievances and impose sanctions on violators of law. The point was made that the Compliance Committee must only undertake what its remit allows, namely the assessment of whether or not a Party has acted in compliance.

One participant was keen to stress that domestic redress mechanisms exist, within states, for citizens to challenge decisions. Such mechanisms were said to be closer to the decision and complainant, and quicker than supranational compliance procedures pursued at the Palais des Nations (P9). The official compliance handbook states that a communication to the Committee must disclose whether domestic redress mechanisms have been exhausted, such that the Committee is the 'last resort' for the complainant (UNECE 2010: 34). The participant in question indicated that the Committee was not being used as the 'last resort', and was in fact vulnerable to zealous over-exploitation by NGOs.

Similarly, Koester notes that, formally at least, “the Compliance Committee should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress” (2007: 87). However, Koester adds a huge caveat: “According to the interpretation of the Compliance Committee this requirement does not mean that failure to exhaust or sufficiently explore the possibilities for resolving the issue through national administrative or judicial review procedures renders a communication inadmissible” (Ibid: 87). Put simply, an allegation cannot be quashed if a complainant uses the Committee as a ‘first’ rather than ‘last resort’. This zealous interpretation of the compliance mechanism will be of concern for state representatives who fear not only a circumvention of sovereignty, but also – and more worryingly – a barrage of allegations against them and their associated public authorities. In this respect, Aarhus’ compliance mechanism shares (for some statespersons, a worrying) affinity with the European Court of Human Rights: both “have relaxed the strict rule that bringing the case before the compliance bodies requires prior full exhaustion of local remedies” (Fitzmaurice 2010: 58).

Concerns about such a barrage of allegations often pertain to the perceived risk that NGOs will overexploit the ability for citizens and civil society to lodge communications without exhausting domestic redress mechanisms. This fear corresponds to suggestions in Chapter 6 that NGOs are ‘crowding out’ lay citizens in environmental participation pursuant to Aarhus. Dellinger asks: “Should NGOs play an expanded role in future Aarhus contexts or is their role already too expansive?” (2012: 361). She continues by observing that “fears prevail among nation states as to possible overreaching by NGOs in compliance contexts... However...so far, NGOs have...proved to exercise very good self-restraint in this regard

and have thus *not* overburdened the Compliance Committee with submissions” (Ibid: 362; emphasis in original).

If states perceive a rise in concerns for the normative spirit as well as the legal letter of the Convention, their insistence on state consent, and unwillingness to go ‘beyond the basics’ of a ‘liveable international order’, may intensify. Moreover, state reticence may be attributable to a reaction against the compliance mechanism’s move towards jurisprudence and precedent setting. It is noteworthy that one NGO manager appeared to pre-empt the criticism of competence creep, being notably keen to stress that the Committee “is *not* looking for anything else than how the Aarhus Convention is or is not implemented. It’s *not* looking for any other things” (P12).

A participatory deficit surfaces in the compliance mechanism’s curatorship principle, by which a single Committee member takes ‘ownership’ of a particular case, and plays a lead role in the respective proceedings. Curatorship involves

...presentation of the communication and recommendations to the Compliance Committee with regard to the preliminary determination on admissibility and questions to be raised with the parties concerned; a leading role at the formal discussion...and elaboration of the first draft findings and recommendations...in order to provide a better understanding of the case and to help identify further information needed (Ibid: 86).

Whilst the Committee’s workload and commensurate need for delegation are appreciable, the prospect of one person taking custody of a case is problematic. Chief responsibility for determining a case’s admissibility should not be assumed by one individual, but should

rather include all Committee members, the Secretariat, and Party focal points, should they wish to contribute. This would imbue the process with greater democratic legitimacy. Ownership of these processes should be collective; outcomes should result from plentiful dialogue. Parties should have a say in compliance cases that ultimately affect them: after all, Committee findings set precedent for future application of the Convention.

A participatory deficit also surfaces in the fact that the Committee comprises seven individuals who yield a very real influence on entire states. At the very least, a case can be made for a country-based rota of Committee members, such that a national of each Party is able to sit on the Committee at some point. Furthermore, a good case can be made for (a) establishing year-long Committee memberships to prevent institutional dogma and (b) encouraging Party delegates to attend Committee meetings as observers. To this end, an interview participant expressed concern that the Committee comprised a tiny panel of unelected, unaccountable experts, which – whilst lacking democratic mandate – was able to yield influence inside domestic jurisdictions (P omitted). The point was made that sovereign states, on the other hand, do indeed have mandate; the claim was made that advanced democracies have great mandate to govern, and representatives of such countries would be able to bring considerable expertise to the Compliance Committee. The logic underpinning this criticism of the Committee's participatory deficit is similar to that in Chapter 6. A tiny expert elite, countable on two hands, is responsible for unilaterally deciding whether or not Parties are in compliance with the Convention. This elite makes recommendations that, when sanctioned by the MoP, may alter governance practices inside sovereign jurisdictions. It is absolutely the case that when a Party changes its domestic practices, to accommodate Committee findings and recommendations, a state has been

altered, and its sovereignty penetrated, by two handfuls of human individuals. It would be anomalous if statespersons failed to question the impact this has on sovereign autonomy.

With this criticism in mind, one civil servant betrayed a degree of frustration with the compliance mechanism, implying that Committee members were making crucial decisions in an almost arbitrary fashion (P6). The speaker called for more rigorous information collection techniques, such as fact-finding missions and direct interviews with ‘witnesses’ to the alleged contravention. The logic was that such data gathering would ground Committee findings in reality, and would avoid an overreliance on written communications and outcomes of hearings at the Palais des Nations: “It’s very complicated...the Compliance Committee decides I’m right, he’s wrong. Or I’m wrong, he’s right. I think each member of the Compliance Committee should go to the country [under investigation], bring interviews from NGOs, from government, from stakeholders, and *then* draft a decision” (P6).

Critics argue that Aarhus’ legal teeth only ‘bite’ when it is enforced in domestic courts. The compliance mechanism is not a court: it is not a tool with which complainants can solve their substantive environmental problems. Rather, it is a device for ascertaining whether or not a Party, in one particular case, acted in compliance with the Convention. For Koester: “the compliance mechanism is designed to improve compliance and is not a redress procedure for violations of individual rights” (2007: 87). Koester is not the only scholar to make such observations.¹⁸⁸ However, one interview participant argued that there

¹⁸⁸ Oliver notes that “the Committee is not a court of law and its proceedings are deemed to be consensual...its rules of procedure are far more flexible than any rules which might be familiar to the judiciary, and the procedure is marked by great informality” (2013: 1467). This is not a criticism, but is indeed an observation of the Committee’s non-court status.

is no reason to suggest that supranational compliance proceedings are incommensurable with domestic litigation. When the present researcher raised the above claim, about a lack of legal ‘bite’, the participant was keen to identify congruence and compatibility between the compliance mechanism and domestic court proceedings:

When you talk about implementing *any* international treaty...you look to the structure of national legislation, institutions and the actual application of the laws in the country, to see how effectively it’s being implemented...To me, there’s *no* contradiction between saying that national implementation structures are incredibly important, but *also* that it’s important to have a supranational process...to actually kick in when member states are failing to...do what they’ve signed up to do (P16).

Under this logic, there should not be such an either/or dilemma. Fears should not exist of incongruence between supranational compliance monitoring and domestic applications of international law. In fact, the two complement one another. On one hand, there must be a mechanism by which Parties are held to account if they contravene their duties pursuant to international law. On the other, Parties must internalise international duties so that they *domestically* act in compliance: it is necessary for domestic redress procedures to exist, so that complainants can resolve procedural impropriety within states. Courts ‘apply, redress and punish’; the Compliance Committee *guides* domestic application only.

Conclusion

This chapter has investigated Aarhus' internal mechanics, and assessed how conducive they are to the effective functioning of the green transparency regime. It will now close with a discussion of the implications for pluralism and solidarism in IEP.

Evidence of solidarism was identified. Firstly, Aarhus evinces valuable norm enforcement potential. Aarhus not only propagated and institutionalised the norms of green transparency and democracy; it also established mechanisms with which to enforce them. The regime has 'bite', seeking to penetrate sovereignty, alter state practices, and make at least tentative headway towards the "police action" of a solidarism in which norm-violating states are scrutinised and sanctioned (Wheeler and Dunne 1996: 95). The Compliance Committee demonstrates, at the very least, potential for realising a solidarism that "presupposes the enforcement of not only the sovereign rights of states but also the rights of individuals" (Ibid: 102). The Committee shares a strong affinity with a formal court, creating a corpus of case 'law' and jurisprudence, whilst recognising Parties as autonomous sovereignties, pursuant to the Vienna Convention (UN 1969). But it goes further, empowering humans to *directly* allege state contraventions. If states are found to have acted in non-compliance, the outcome of a direct citizen allegation is enormous: the state in question will have to alter its domestic practices if it wishes to return to a state of compliance. This *alteration of sovereignty* is sparked by a human individual, in cases where the initial allegation was lodged by one. This is vital, indicating that humans can modify sovereignty, and change state behaviour, albeit incrementally, on an ad-hoc basis. The mechanism's provision for citizen allegation, and candid dialogue between (human) complainants and alleged (state) contraveners, vindicates Falkner's claim that "environmental responsibility can be seen as

a challenger norm in international society, potentially playing a vanguard role in the progression towards a solidarist international society” (2012: 515). Whilst work for this chapter did not detect an attenuation of sovereignty, it *did* observe the transfusion of cosmopolitan values into a still-statist IEP. Sovereign orthodoxies remain, but a more *responsible sovereignty* has emerged, whereby human individuals play a greater role in (a) identifying state norm-violations and (b) holding states to account.

Drawing this finding “is not the same as claiming that sovereignty has been eroded. Far from it: the persistence of the institution of sovereignty acts as a constraint on the transformative force of global environmentalism, channelling it into modes of political organisation and governance that can for the most part be accommodated within the evolving structures of international society” (Ibid: 516). And that is a positive thing. This thesis argues that world society values should indeed emerge, but should *augment* the orthodoxies of international society. World society, the human dimension to IR that knows no borders, should accompany, and not compete with, the Westphalian state system. First, this is morally desirable, given the law and order, identity, and stability afforded by (democratic) states. Second, this is practically feasible: well-institutionalised cosmopolitan values and rules will simply not emerge without a stable political framework governed by a society of states. This is an evolutionary, conservative conclusion: IEP is better off taking what it already has – states, sovereignty, norm-oriented regimes and international law – and reforming and enriching its extant resources with humanity. Under this logic, “cosmopolitanism [is] a moral lubricant that helps the society of states to run more smoothly” (Linklater 2002: 137).

Work for this chapter found evidence to equate Aarhus with a cosmopolitan green harm convention. This surfaced in Article 3(8), empowering humans to procure data, participate, and seek redress without being “penalised, persecuted or harassed in any way for their involvement” (UNECE 1998: 5). It also surfaced in Article 3(9), empowering humans to enjoy their rights “without discrimination as to citizenship, nationality or domicile” (Ibid: 5). These clauses demonstrate that a human’s state allegiance or abode is immaterial, when she exercises her Aarhus rights in the territory of a Party. Irrespective of whether she is a citizen of the Party or an alien, she can still use her Aarhus rights inside that jurisdiction. Moreover, her discharge of those rights, and the Party’s execution of its commensurate duties, must occur without direct or indirect injury, harm or ostracism being visited on her. Consequently, Aarhus’ multilateral recognition of such transnational citizenship rights coheres with Linklater’s observation that

Extending support for the harm principle beyond national borders has not only been important for creating order between states; it has been significant for realising what Bull regarded as the more fundamental purpose by which any international order should be judged: by the part its members play in creating a ‘world order’ which is concerned with the security of individuals as well as the security of states...Contemporary international law provides evidence of how shared understandings of harm and suffering have made it possible for different societies to reach an agreement about the essential features of a cosmopolitan ethic (2006b: 334).

The provisions for safeguarding the execution of rights without harm, and for rendering allegiance or abode immaterial, also resonate with Elliott's conception of a cosmopolitan green harm convention. These provisions for human empowerment, irrespective of national borders, constitute a recognition of, and response to, the fact that "those who are most disadvantaged do not have the freedom to choose...whether they are harmed by the environmental impact of the activity of others. Thus the injury and danger to them arises not only because of the impact of...environmental harm on their lives and livelihoods but also because their autonomy is undermined or denied" (Elliott 2006: 350). The provisions also exemplify what Falk regards as "the essence of a humane approach" to environmental governance, namely "the assurance that all peoples have their individual and collective rights realised" and that these rights "are being actively affirmed as policy goals to be seriously pursued" (2001: 222).

Solidarism is also evident in the Convention's norm propagation and institutionalisation. The opportunity, in Article 19(3), for any sovereign state to join the Aarhus regime is vital. Despite the regime fostering a European regional international society, scope remains for global expansion. Developments in the ECLAC region substantiate this claim, as does a plentiful degree of cross-pollination between Aarhus and other international fora. Aarhus' fruitful interaction with other IGOs such as ECLAC, other international regimes and bureaucracies, and other non-Party states such as China and Mongolia, demonstrates how *regional* examples of solidarist societies "may not yet have manifested their strength sufficiently to underpin any global solidarism, but...might be given some credit for pushing things along to where the logic of like-units is strong enough at least to support" such aspirations (Buzan 2004: 148).

Moreover, cosmopolitan concerns manifested themselves in the regime's dialogic nature. Notwithstanding the participatory dialogue analysed in Chapter 6, Aarhus' own internal machineries are equally dialogic. On each day of embedded fieldwork, the researcher was surprised to witness a striking degree of candid, frank and unimpeded dialogue between state delegates, civil society actors and international civil servants, gaining the clear impression that Aarhus' internal proceedings offered a 'level playing field' on which each stakeholder enjoyed an equal opportunity to hear and be heard. The researcher was left with an unequivocal impression that the Convention was seeking to lead by example, and 'live' its principles of participatory equality, transparency and democracy. As such, the Aarhus regime represents an appreciation and operationalization of the dialogue principle. It reflects, in a practically feasible and normatively diluted way, Linklater's call "for creating democratic structures nationally and internationally which recognise that each individual counts for one and only one. This is one test of a community's commitment to cosmopolitanism" (2002: 141).

Similarly, a gratifying degree of dialogue was observed in the compliance mechanism's provisions for public participation, openness to civil society observation, and enthusiasm for a collegial and collaborative approach to compliance, whereby complainants and contraveners seek consensus. These observations confirm Bernstein's remark that

In the absence of radical cosmopolitan reform...legitimacy can...be improved with...requirements for fully-fledged deliberative and democratic mechanisms...As opposed to direct accountability to publics through elections, proposals are increasingly rooted in deliberative models of legitimation...where legitimacy ideally requires that decisions rest on 'good arguments' made under conditions in which free and equal...actors...

challenge validity claims, seek a reasoned...consensus about their understandings of the situation and justifications for...their action, and are open to being persuaded (Bernstein 2004: 147).

To a notable degree, Aarhus dispels the prevalent view of “IR scholars [who] generally recognise that such ‘ideal speech’ situations are unlikely to obtain in international negotiations or forums” (Ibid: 147). A close analysis of the regime indicates that dialogue, and headway towards stakeholder consensus, *is* possible: it takes, however, considerable effort, and requires a cultural change within political orthodoxies that accepts as legitimate and valuable the views of *all humans*, irrespective of where they come from, or on whose behalf they are working. Such sentiment manifests itself, not least, in the membership of the Compliance Committee, which is an organ of human experts rather than state delegates.

But it would be naïve to claim that Aarhus is more *revolutionary* than *evolutionary*. Pluralist realities were identified in the regime. These are to be expected given the necessary statist status quo underpinning green multilateralism. Sovereignty and the requirement for state consent remain: without them, there would be no assignment of Aarhus’ rights to humans. Without them, humans would not be endowed with a voice and an audience in IEP. The right to hear and be heard is contingent on the consent of states, the endowing actor in IEP. Citizens cannot, and should not, ‘go it alone’. Prophecies of an emerging cosmopolis, a *Gemeinschaft* (not *Gesellschaft*) that exists “within, beneath, alongside, behind and transcending the...society of states” (Manning 1975: 177) did not materialise during research for this chapter. Such prophecies are neither feasible nor desirable; they are dangerous given their attempted usurpation of sovereignty.

However, sovereignty has indeed changed under the Aarhus regime. The propagation and enforcement of green transparency and democracy norms and the modification of political orthodoxies from within have rendered sovereignty more human-oriented. Sovereignty, in this case study, has been cosmopolitanised: it has become a *responsible sovereignty*. Aarhus adds empirical value to Weinert's theory of democratic sovereignty, which "rearticulates 'supreme authority' as a process oriented towards the common good" and seeks to "embrace, extend and defend a conception of basic liberties and rights available to each individual" (2007: 27). Weinert concludes that reconceiving sovereignty in such a responsible guise serves to

...underscore the notion that sovereignty emanates from and serves the communities in which it resides. A democratic sovereignty...subverts spatial divisions in favour of the development of communities (both domestic and transnational) in conjunction with common good-oriented activities. Democratic sovereignty...radically qualifies the hierarchy of political space by redefining authority in the more human rights friendly language and logic of a common good (Ibid: 27).

Aarhus' solidarist rationales thus *enrich* and cosmopolitanise the pluralist realities that must be expected, in view of Westphalia's necessarily impenetrable framework according to which our political world is delineated. Those realities should not go unnoticed: they can be remedied if the Aarhus regime rebrigades itself and fosters greater attempts at reform. In particular, attention must be drawn to the lack of non-UNECE accession; the negligible likelihood of a global 'Principle 10' treaty; the prevalence of late, poorly constructed, and sometimes absent National Implementation Reports; and irregular and erratic financing.

Each of these difficulties is not only an impediment to the regime, but an indicator of state consent, and a degree of unwillingness to go ‘beyond the basics’ of cooperation to secure anything more than a ‘liveable international order’.

Pluralist impediments were also identified in the compliance mechanism, which is susceptible to (a) avoidance or mere token consideration by Parties; (b) a lack of ‘follow-up’ powers to pressure Parties to alter their behaviour; (c) complaints that its legal ‘teeth’ only ‘bite’ when domestic courts apply and police the Convention; (d) worries that participatory deficits jeopardise the dialogue applauded earlier; and (e) concerns that states may (justifiably) display hostility and reticence towards attempted competence creep and a commensurate erosion of sovereignty.

The chapter concludes that it would surely be anomalous and worrying to *not* have identified such pluralist realities. Aarhus is an MEA; it embodies a society of states, united in their shared concern for environmental transparency, democracy and procedural propriety. It is managed under the auspices of an IGO, and follows the well-worn path of international law, an invaluable political orthodoxy that is used time and again by sovereign states to solve collective problems. If these sorts of practical statist difficulties were not experienced by the Convention, there would be real cause for concern. At least such pluralist impediments indicate that Aarhus is being utilised by its member states and – more importantly – human individuals therein. Moreover, pluralism places huge value on heterogeneity in international affairs; it seeks to preserve states’ difference, diversity and distinctiveness; and it counsels avoidance of homogenising *universal* norms and imposing them on *particular* countries or regions (Rengger 1996: 69; Williams 2005). Pluralism is therefore evident – for laudable reasons – in ECLAC’s desire not to accede to the

Convention, but rather to 'green' its own regional international society, and use Aarhus as a springboard from which to negotiate its own Convention on green transparency and democracy. Cultural sensitivity, and an appreciation of diversity in international affairs, is a pluralist quality, and far from an impediment to the Aarhus regime. The regime's key achievement is therefore to have cosmopolitanised, and tentatively rendered more responsible, sovereignty in one corner of IEP. Whilst pluralism and sovereign statehood remain, this is not entirely problematic; it would be of concern if this were not the case.

9 Democracy

The challenge of successful implementation of the Aarhus Convention in the EECCA region...goes beyond implementation of any other [MEA] because it requires changing practices that are rooted in the Soviet traditions and culture of governance.

Zaharchenko and Goldenman (2004: 245)

This study now assesses the degree to which Aarhus is associated with democratisation in post-Cold War Europe, and the extent to which the rigour of implementation is contingent on Parties' political cultures. Put simply, the chapter asks if Aarhus is a democratising phenomenon, and whether its chances of success depend on the type of political regime governing a Party (advanced democracy, illiberal democracy, authoritarian regime etc.). Researchers increasingly agree that a link "exists between the level of democracy and the stringency of environmental policies" (Fredriksson and Wollscheid 2007: 381), finding that "democracies set stricter environmental policies than autocracies" (Ibid:383). Scholars have also identified a link between regime transparency and the proportion of democracies subscribing to a regime. While "Regimes composed largely of liberal democracies will probably achieve greater transparency...because of the...more open information flow within such societies", "authoritarian governments know and will reveal less about their citizens, while their citizens know and will reveal less about their governments, creating institutional obstacles to regime transparency" (Mitchell 1998: 113).

This chapter follows with two sections. The first evaluates the Convention's performance in advanced democracies; the second assesses the Convention within the Eastern Europe, Caucasus and Central Asia (EECCA) region. In the democracies of the 'western' EU and Scandinavia, Aarhus is relatively successful. Parties seem committed to compliance, and have altered their laws and practices to accommodate the Convention's demands. But this is not wholly attributable to Aarhus *per se*. Western European and Scandinavian states already have the robust regulatory mechanisms, and cultures of tolerance and participation, needed for the Convention to flourish. Nevertheless, fieldwork gauged two presuppositions that regularly emanated from practitioners: (a) the need for permissiveness and progressiveness and (b) the need for active environmental citizenship.

But some implementation problems remain in the advanced democracies. Firstly, whilst the EU has codified directives on the Convention's first two pillars, it has yet to codify a 'pillar three' directive on green justice. Secondly, restrictive legal standing is as prominent a problem in advanced democracies as it is in the EECCA region. This only serves to exacerbate, thirdly, a degree of residual mistrust between state officials and civil society in the advanced democracies. Fourthly, inequities exist *within* the EU. The EU is not a level playing field on which Aarhus can be implemented.

In reference to the EECCA area, it can be difficult, and occasionally mortally dangerous, for citizens to exercise their Aarhus rights. Administrations in this region are often hindered by legacies of autocracy, mistrust between officials and citizens, corruption and environmental mismanagement. In recognition of these legacies, and the need to overcome them, capacity-building has figured prominently on Aarhus' agenda since signature. The researcher detected a relative consensus in support of these endeavours. However, much is

yet to be achieved, before Aarhus can be implemented as rigorously in the EECCA region as it is in the advanced democracies.

Advanced Democracies

Work for this chapter found that Aarhus is generally implemented more successfully and rigorously in Western European advanced democracies than in the former socialist world. Two presuppositions were identified in fieldwork. Representatives of advanced democracies, and the rhetoric of such democracies, evinced the presupposition of (a) permissiveness and progressiveness and (b) the need for active environmental citizenship. Research identified changes in attitudes, behaviours and practices resulting from Aarhus' implementation inside states. Such progress is perceptible, inter alia, in recent changes to the UK Civil Procedure Rules, *Eye on Earth*, numerous EU Directives, and the ardent use of the compliance mechanism by Western European civil society. But Aarhus does not have a flawless record. The EU lacks a pillar three Directive; some strata of civil society such as 'deeper green' campaigners may be sceptical of their Aarhus rights, displaying residual mistrust and suspicion of states; a 'consultation-culture' may quell 'purer' modes of participation; and disparities continue to divide EU member states, by virtue of their widely diverging political and judicial cultures. It appears that the EU is not a level playing field upon which Aarhus can be implemented.

The prevalent sentiment, gauged in fieldwork, was that Aarhus generally works well in advanced liberal democracies. A diplomat noted that state attitudes and practices had changed, in advanced democracies, to reflect the green transparency regime (P4). A civil servant stated that Aarhus is functioning well in such democracies (P9). They observed that

such democracies possess the regulatory infrastructures needed to safeguard information access, participation and justice. They indicated that environmental decisionmaking has not altered tremendously since Aarhus' signature, because advanced democracies were *already* liberal, democratic, inclusive and participatory (P9). Under this logic, Aarhus confirms, rather than stimulates, democratic green governance in advanced liberal democracies. A solicitor was pleased with Aarhus' implementation in Western Europe, arguing it had a more pronounced impact than states envisaged: "It's had a great effect. But I don't think the UK government quite saw it that way when they signed up to the Convention. I think they thought it would be business as usual, and that it wouldn't make a massive difference. But it has, in lots of different, quite pervasive ways" (P3). The speaker cited changes to the UK Civil Procedure Rules¹⁸⁹, "which would not have been brought about if it wasn't for Aarhus" (P3). These changes were said to be "a big achievement in the UK" (P3). The solicitor noted the importance of Parties *already* possessing cultures of permissiveness and progressiveness, empowering citizens to exercise their rights confidently and without fear. They noted that the UK has "a sophisticated system of NGOs, which are generally pretty savvy...There's a much more effective lobbying machine, and informed members of society...are willing to use those mechanisms. You can see that by...the percentage of UK [compliance] communications in comparison to the others" (P3). They remarked that "the UK takes its obligations very seriously and it doesn't like being out of compliance with things like this...you have a much higher standard of implementation" relative to other Parties (P3).

¹⁸⁹ The 66th Update to the UK Civil Procedure Rules came into force on 1 October 2013. PD3E on Costs Management is amended with a revised Precedent H, a document which delineates the myriad costs that must be calculated when undertaking legal proceedings. Part 47, 'Procedure for Assessment of Costs and Default Provisions', makes a modification to clarify the amount of costs that may be recovered for matters that do not go beyond provisional assessment of costs, and whether that amount includes court fees and VAT.

Another solicitor also praised changes to the UK Civil Procedure Rules, noting that they “are almost certainly a result of Compliance Committee findings” (P13). A researcher was confident that Aarhus changed government attitudes and practices: “I think, on the whole – at least among the civil servants with whom I’ve spoken – there seems to be a true willingness to do things in the most transparent and democratic way” (P20). Moreover, in seeking evidence of Aarhus’ influence in advanced democracies, a NGO manager turned to the more expansive green transparency discourse that Aarhus was said to have stimulated in Europe (P12). This participant referred to the European Environment Agency (EEA), and especially the *Eye on Earth* initiative. *Eye on Earth* is an EEA process that has created a global public information network to share environmental data online, using mapped visualisations. Identifiable is a clear focus on the value of social networks and unimpeded data access by using mobile rather than solely computer-oriented technology. A good case can be made that Aarhus was a key stimulus for this process. One international civil servant, however, was keen to avoid the mistaken assumption that all advanced, liberal democracies are Aarhus leaders. Placing aside the USA and Canada, both pre-signature negotiators that refused to sign the Convention, this participant stressed that Switzerland, supposedly a paragon of contemporary democracy, had not ratified Aarhus (P17). Subsequently, Switzerland *did* ratify, in March 2014 (UNTC 2014a: online). But it took the country 16 years.

Advanced liberal democracies have strong regulatory frameworks and tolerant political cultures. Democracies are more likely to sign and enact environmental agreements than non-democracies (Ward 2006: 153). Such political cultures are deeply rooted. One can, for instance, trace the ‘right to know’ dictum back to the first Freedom of the Press Act,

codified in Sweden in 1766: “Swedish citizens have had a right of access to public data, unmatched in any other legal system”, since that year (Sand 2003: 489). Despite other Scandinavian states following later, with Finland’s Publicity of Documents Act of 1951, and Denmark’s Public Access Act of 1970, the Scandinavian approach “to government-held information remained unusual among the prevailing pattern of ‘arcane administration’ in Europe, where access to files by citizens was long viewed as incompatible with the principle of representative – as distinct from ‘direct’ – democracy” (Ibid: 489).

Such cultures are cornerstones of human empowerment and autonomy. Ethics of tolerance, freedom of expression, and openness to positive societal progress manifested themselves in repeated applause for ‘multi-stakeholder dialogue’, gauged during fieldwork. During embedded work, one representative of an advanced Western democracy stated: “You need to be in it to win it” (F6). This was a striking comment. The point was that citizens must immerse themselves in the institutions and procedures of governance, because without such immersion, they stand scarce chance of influencing (and ‘winning over’) public decisionmakers. The researcher noted two presuppositions when this motto was voiced. Both presuppositions surfaced elsewhere during fieldwork, and have broader ramifications. First, the delegate evinced a presupposition of permissiveness and progressiveness. A *state* delegate had enjoined citizens to be ‘in it’, to enter the statist status quo, to enter traditional power orthodoxies and enrich them with their own perspectives. This presupposition was evolutionary, reformist and open to the incremental alteration of orthodoxies from within. Second, the delegate evinced a presupposition of the need for civic duty: it was deemed incumbent on citizens to proactively involve themselves with Lincolnian government, of, by and for the people. Under this logic, *active* citizens must demonstrate and fulfil the duty

of democratic participation, not only for the sake of their fellow citizens, but also for the sake of their environment.

These two presuppositions, of permissiveness and progressiveness, and of the need for civic duty, resurfaced during research for this chapter. They animate the implementation of Aarhus in advanced democracies. During embedded work, one delegate enjoined Parties to use the principle of a “critical friend” when administering green decisionmaking processes (F6). A critical friend was portrayed as a reliable, honest, active citizen who is ‘on board’ rather than ‘inside’ a particular decisionmaking procedure. Such a friend would be positioned safely within the parameters of state and society, and would thus subscribe to the norms and rules of democratic participation. However, they would *also* be willing to critique the administration and voice dissent, or concern, without fearing the consequences of collective responsibility. The role of a critical friend would not be to play the ‘Devil’s Advocate’, but rather to candidly express concern about the propriety of a decisionmaking procedure. It is noteworthy that this principle was recommended by a representative of an advanced democracy, for it conjured an image of an independent legal advisor, or even a chaplain, offering counsel before the execution of decisions. Such advisors are neither ‘on the inside’, nor dissociated from the entities responsible for the decision. Rather, they are ‘on board’ and ready to give counsel without fear or favour.

Buzan writes that the EU “is heavily institutionalised, and pursuing both social market and single market objectives. Its attempt to move beyond Westphalian international politics has produced perhaps the only example of a convergence interstate society ever seen, and the only one that begins to approach a world society” animated by shared *human* values (2004: 208-209). With this in mind, it is noteworthy that the EU in its entirety signed Aarhus in

1998 and was approved as a Party in 2005, pursuant to Decision 2005/370/EC (EU 2005). In 2003, the EU adopted two Directives pertaining to Aarhus' first two pillars. Directive 2003/4/EC (EU 2003a) concerns environmental information access; Directive 2003/35/EC (EU 2003b) concerns public participation in environmental decisionmaking. Both offer justice provisions. Information access¹⁹⁰ and participation¹⁹¹ also surface in other Directives. But the EU has struggled with enacting a discrete green justice Directive. The proposal (EU 2003c) for such a law was issued over a decade ago and remains on the table. This gridlock is a serious point of concern.

Moreover, the EU "has traditionally been somewhat reluctant to apply such rights and legislation to its own institutions" (Pedersen 2008: 107). This sentiment is echoed by Toth: "Whether Aarhus truly signals a major democratic institutional change at the EU level is at best highly questionable, although Europhiles have little reason to discourage such notions. Brussels would no doubt happily promote the adoption of Aarhus principles as a remedy to the oft-maligned democratic deficit at the EU institutions" (2010: 325). Remedying this, the EU adopted Regulation 1367/2006/EC, applying the procedural trinity to Community institutions and bodies (EU 2006). This 'Aarhus Regulation' pertains not only to official institutions but bodies, offices and agencies created by, or under the auspices of, the broader EU. All such entities must act in compliance with Aarhus, so that the EU in its entirety remains in compliance. Crossen and Niessen invest much hope in the Regulation, which "provides a right for NGOs...to make a request for an 'internal review' to the Community institution or body that adopted an administrative act under environmental

¹⁹⁰ See Regulation (EC) 1049/2001 on public access to European Parliament, Council and Commission documents.

¹⁹¹ See Directive 2001/42/EC, on environmental plans and programmes, and Directive 2000/60/EC, the Water Framework Directive.

law, or should have adopted such an act ('administrative omission'). Any NGO that makes a request for an internal review may institute proceedings before the ECJ" (2007: 334).

The Aarhus Regulation is one acknowledgement of the fact that advanced democracies are not flawless, and may need assistance in executing their Aarhus duties. There is a sense that the EU and its members have been forced to enact green transparency legislation, because apart from the green realm, there is a lack of law requiring EU Member States to disclose information (Oliver 2013: 1436). This sentiment also surfaced at the third meeting of Aarhus' Task Force on Public Participation, in which concerns were expressed that participation was only provided by Parties to comply with legal requirements (UNECE 2013f: 8). Such scepticism of the sincerity of EU members' implementation of Aarhus also surfaced in an interview with a green campaigner. This participant doubted Aarhus' capacity to foster progress in liberal democracies. They were concerned that environmental activism was a sensitive, and sometimes risky, pursuit in Western Europe (P7). Whilst such scepticism and bias is to be expected from this stratum of the stakeholder community, it is noteworthy that this speaker was suspicious not only of governments, but also of supranational entities such as the EU's Directorate General, Environment. The latter scepticism was evidenced with the claim that information requests had been lodged with the EU to establish the entirety of communications it had processed from NGOs (P7).¹⁹²

¹⁹² The researcher traced this claim back to an Andreas Pavlou, affiliated to 'Access Info Europe'. He made such a request to the EU Secretariat General on 25 January 2012. It requested data on the participation rates of the 15 public consultations instigated by all Secretariat Generals in September 2011. It sought the types of participating organisations, and the number of individual/organisational responses. See: http://www.asktheeu.org/en/request/public_participation_ratesdata [Accessed 19.9.13].

Further, Sweden, an Aarhus Party and often-claimed model democracy, has been said to adopt highly restrictive *locus standi* (legal standing) practices. In *Djurgården*, for instance, a complainant filed proceedings against a Swedish law “according to which the only NGOs entitled to seek judicial review of a decision on development consent were those with at least 2000 members. Sweden acknowledged that only two NGOs in the entire country met this requirement!” (Oliver 2013: 1450; exclamation in original). One would be forgiven for assuming that such narrow standing would most likely surface in a post-Soviet autocracy. Yet it was contested in a state often deemed an exemplary social democracy. The judiciary ruled that whilst it is “‘conceivable’ that such a minimum membership requirement might be ‘relevant’ ...to ensure that the NGO ‘does in fact exist and that it is active’ ...the number of members required could not be fixed at such a level that it ran counter to the objectives” of Aarhus and broader environmental impact assessment (in Ibid: 1451).

Indeed, restrictive standing is a recurrent difficulty in the Convention. Narrow standing, constraining who can achieve justice in court, impedes human empowerment. This is because it privileges some citizens over others, and silences those who are not granted standing. Indeed, a 2007 survey of EU member states found that “standing seems to be a significant obstacle for individuals and associations in challenging actions or omissions by the administration” (Fitzmaurice 2010: 55). Fitzmaurice observes that, in Germany and Finland for instance, standing for individual citizens is very limited (Ibid: 55). However, this study emphasises that a ‘narrow door’ into the court may provide vast room for complainants, defendants and arbiters to interrogate the merits of a case. Once access has been granted, there may be vast scope for deliberation. Conversely, a ‘wide door’ may grant standing to a majority of complainants, but may *preclude* such a vast opportunity for complainants to scrutinise the minutiae of a case. Fitzmaurice notes that in more recent EU

member states such as Czech Republic, Hungary and Slovakia (each 2004 entrants), narrow *locus standi* derives from administrative attempts to either limit the cases where public participation is required, or even limit the concept of ‘participant’ altogether (Ibid: 56). This is not a new problem. In 1994, UNCHR concluded:

A denial of standing in the process of environmental impact assessments and in judicial action has been a particularly effective means to prevent meaningful public participation...first, because it denies the ability to prevent harm and second, because it denies the possibility of reparations... [S]tanding must always be broadly granted to foster public participation and to better protect all human rights in an environmental context (UNCHR 1994: 46).

Fitzmaurice’s reference to more recent EU member states serves to underline the final implementation difficulty detected during work for this section, namely the inequity *within* the EU. During embedded work, a degree of consensus emerged to indicate that whilst the EU is formally a uniform community, it is in reality *not* a level playing field on which to implement Aarhus (F1). Inequalities between the most and least capable and compliant EU member states remain, *despite* the EU itself being a ‘block-voting’ Aarhus Party (F1). Some delegates substantiated these inequalities by noting disparities between progressive (spirit of the law) and conservative (letter of the law) courts in the EU, whose differing cultures determine their rulings (F1). During embedded work, the investigator also heard recollections of two legal cases made pursuant to Aarhus. Reference was made to “two gentlemen”, the former a British birdwatcher, the latter an Italian living on the coast. In both cases, developments were proposed. In a slightly satirical tone, one delegate implied that whilst both proposals were cast as environmentally harmful by the complainants, they

were, more likely, aesthetically displeasing annoyances, which would hinder such ‘gentlemanly’¹⁹³ pursuits as birdwatching and enjoying coastal scenery. The UK and Italy granted standing to both complainants respectively. It was claimed, during embedded work, that the litigants would have been denied standing in other (more recently democratised) EU member states. In fact, “they would not even have come close to the gates” (F2). Disparities therefore exist *within* the EU, and have a bearing on the Convention’s implementation.

Such concerns with Aarhus’ implementation in advanced democracies were identified in fieldwork. A solicitor lamented “the very short consultation periods we’re seeing now for various consultations that the government are taking” (P3). A researcher stated that whilst Aarhus has had a valuable influence on such democracies as the UK, there are still problems: “There have been changes in the relevant legislation. There’s very much a focus on information. People are increasingly aware of the ability to take part in public consultations. But then of course you have legislation which is not properly implemented. There *have* been stakeholders who have been excluded...It’s become more democratic, but it’s not fully democratic” (P18). A lawyer doubted Aarhus’ capacity to garner real progress in advanced democracies, claiming that the UK, for instance, remains preoccupied with public consultation:

In practice, there are opportunities for *consultation* but that’s quite different from democratic decisionmaking...I know that in Canada, they have far greater provisions for participation by the public. For example, when

¹⁹³ Recall Inglehart’s postmaterial claim that those possessing the most rudimentary necessities (food, shelter, finance) can entertain more luxurious interests such as environmental protection. Also recall Toth’s observation that “A public that is predominantly concerned with making ends meet may view strong environmental institutions as a luxury, at least until environmental problems reach crisis levels” (2010: 297).

making decisions about the use of land in Vancouver, they are very effective in involving the community and ensuring they *participate*...It's a higher level than the levels of consultation that we have here [in the UK] (P19).

The participant complained that “we seem to have got stuck very much on consultation and not really a great deal more” (P19). Further, evidence indicates that Aarhus has less influence inside advanced democracies than some claim. The UK Parliamentary Office of Science and Technology issued a paper on Aarhus in 2006 (POST 2006). Since then, the Office has reportedly received no enquiries about it from within Parliament, leading one source¹⁹⁴ to infer that Aarhus is “not a burning issue” among MPs, constituents, or even wider society. A barrister remarked that advanced democracies have their own administrative legacies of suspicion and doubt surrounding green civil society (P21). The speaker stressed that former socialist regimes are not the only ones attempting to narrow the (literal and figurative) distance between the administration and green civil society. During Aarhus’ negotiations,

...there was a change in UK government...Labour...put out *In Trust for Tomorrow*, an environmental rights document...And we were very hopeful ...that they were serious about this: not, as it turned out. I had a...discussion with [omitted], who was the [omitted], arguing for a substantive right to the environment. He was horrified...He said, ‘That means if air quality was not being complied with, judges could tell the local authority that they were out of order!’ (P21).

¹⁹⁴ Correspondence with an anonymous Westminster source.

Eastern Europe, the Caucasus and Central Asia: the EECCA Region

...experience indicates that the discretion allowed to Parties...has been most problematic for EECCA Parties, some of whom have struggled to accommodate freedom of information within administrative cultures with an institutional memory of secret and closed decision-making.

Mason (2010: 22)

...powerful norms make liars of everyone who is afraid to challenge them head-on.

Shue (1995: 455)

Implementing Aarhus in the EECCA (Eastern Europe, Caucasus and Central Asia) area is troublesome and sometimes mortally dangerous. Recalling Article 3(8), demanding that those using their Aarhus rights must be able to do so without persecution or harassment (UNECE 1998: 5), it is worth noting the clear line taken by the official implementation guide: “As in so many other situations that involve openness and transparency and where economic interests are at stake, persons who take the risk of demanding that the rules should be complied with and proper procedures followed need to be protected from various forms of retribution (UNECE 2000: 47). Registering the severity of the present conflict in Ukraine, this section begins with coverage of the Honcharenko case. On 3 August 2012, a Ukrainian environmentalist, Volodymyr Honcharenko, died in Dnepropetrovsk, an eastern

Ukrainian city.¹⁹⁵ He had been savagely attacked by unknown assailants two days earlier, when driving home (Coynash 2012b: online).

Honcharenko had headed the NGO ‘For the Right of Citizens to Environmental Safety’. On 27 July 2012, he gave a conference, disclosing information about 180 tonnes of contaminated waste, situated in the south-eastern city of Kryvy Rih (Ibid). This comprised three toxic heat exchangers (Kharkiv Human Rights Protection Group 2012: online). In the conference, Honcharenko explained that for many years in Kalusz, western Ukraine, a facility had produced hexachlorobenzene, a carcinogenic chlorocarbon, banned by the Stockholm Convention on Persistent Organic Pollutants (Environmental Protection Agency 2013: online). The exchangers were used in the production of this chemical. Honcharenko revealed that the exchangers were buried in Kalusz at the end of their working lives. They were then sold and conveyed to Dnepropetrovsk (Kharkiv Human Rights Protection Group 2012: online). Honcharenko disclosed that when, in 2006, workers disassembled the exchangers they suffered symptoms of hexachlorobenzene poisoning: dizziness and nosebleeds (Ibid). The exchangers returned to Kryvy Rih. Whilst campaigners warned regulators of the dangers of transportation, and that the owners had no hazardous goods license, no action was taken to secure the convoy or limit the environmental and public health risks. It was claimed that whilst regulators had identified the exchangers, and taken samples for testing, the storage site was next to a vital reservoir (Ibid).

Despite receiving “numerous” previous threats (McKee 2012: online), Honcharenko condemned what he deemed the “criminal inaction of officials responsible for monitoring the environment’s safety” (in Frontline Defenders 2012: online). Honcharenko called the

¹⁹⁵ Dnepropetrovsk had been a closed city during the Soviet era, until the 1990s, by virtue of its nuclear and military production facilities.

waste a “chemical time bomb”, warning that it might resurface in exported scrap (McKee 2012: online). An ‘Aarhus activist’, he demanded access to accurate information, charging the Ukrainian government with failing to publish legally mandated reports on the state of the environment (Ibid). After the conference, the waste was reportedly assigned to the Environmental Prosecutor, although a uniform administrative silence was said to have concealed the particulars of a formal investigation, the whereabouts of the waste, and any knowledge of culpability surrounding Honcharenko’s murder (Coynash 2012a: online). Coynash complained that “All of this is in howling violation of the Aarhus Convention, which is intended to defend our right of access to information about the environment. This is not information about ladybirds and butterflies, but about what has immediate significance for our safety and health” (Ibid). Elsewhere, Coynash wrote: “access to information turns into meaningless farce if people are killed for exposing inconvenient truths” (2012b: online). She expressed concern that investigators only explored as motives for the murder (a) ‘conflict in connection with a road accident’ and (b) ‘professional/commercial’ work: “If, according to the investigators, the attack was prompted by a road accident, it would be good to know why the police report that the two cars ‘collided’, whereas Honcharenko told his son-in-law [via telephone] that the other car had blocked his path” (Ibid). In 2013, Coynash wrote: “The dangerous scrap metal load he reported four days before he was attacked has vanished, and the promised test results have not eventuated” (2013: online).

In 2012, a group of Ukrainian citizens wrote to the Aarhus Bureau regarding the murder. They alleged “failure by the authorities to adequately investigate the allegations...made... before the murder concerning chemically contaminated scrap metal” (Civic Movement et al 2012: 1). They also complained: “All our efforts to ensure proper investigation and

response have been met with resistance” (Ibid: 1). The first of their seven allegations is most significant, pertaining to the waste’s conveyance back to Kryvy Rih:

Inaction from the Ministry of Emergencies and the traffic police who were warned in advance that scrap metal contaminated with the highly toxic hexachlorobenzene was to be transported through Kryvy Rih on 10 July 2012 without the appropriate permits and without any safety precautions. Not one representative of these State agencies was present. It is likely they deliberately kept away since the weight of the load alone meant that the traffic police needed to be in attendance. They were not (Ibid: 1).

In response to this, Jit Peters, Chairman of the MoP, wrote to Eduard Stavytskyi, Ukraine’s Minister of Ecology and Natural Resources. The wording was, at the very least, robust. It was recalled that, during the meeting of the Working Group,

Ukraine informed delegates that an official investigation was underway... The conclusions were expected on 10 September 2012. However...to date the Government has made no official statement and has provided no information...[T]he Bureau is deeply concerned about any situation that may imply contravention of the...Convention. Taking into account the gravity of the allegations, which may imply non-compliance by Ukraine... the Bureau would appreciate receiving your comments and relevant information with regard to the follow-up action undertaken...after the killing of Mr Honcharenko, including the issuance of an official report on the allegedly illegal transfer of contaminated scrap metal (Peters 2012: 1).

Ukraine's response was evasive. The letter avoided the circumstances of Honcharenko's death, broadly claiming instead that environmental quality tests had been conducted, and that "hexachlorobenzene concentration does not exceed the maximum of the permissible level and the...level of the absorbed dose of gamma radiation does not exceed the acceptable level set by Norms of Radiation Safety of Ukraine-97" (Stavytskyi 2012: 1). Worryingly, the letter stated that, "at the time of the commission examination in the industrial area" under investigation, the three heat exchangers were "not found" (Ibid: 1).

The Honcharenko case was discussed from the outset of this section as it demonstrates (a) the disparities between Parties, in terms of political culture; (b) the potentially mortal risks to persons in the EECCA region wishing to exercise their Aarhus rights; and (c) the residual prevalence of Cold War legacies that continue to impede the propagation of democracy and greater affinities between both sides of the once Cold War divide. Particular reference is made to legacies of mistrust, misinformation, corruption, secrecy and (literal and figurative) state-citizen distance. These legacies will now be interrogated in further detail.

Cold War Legacies

The end of the Cold War, collapse of bipolarity and fall of the Berlin Wall may ostensibly have broken barriers between East and West. They may have beckoned democracy, and a cascading political, social and economic liberalisation in the former socialist world. Spurred by globalisation, the information revolution, and a cosmopolitan youth that knows no borders, the Cold War's end may have fostered a more integrated Global North, encompassing not only the North Atlantic region but also a swathe of the EECCA region.

But numerous Cold War legacies hinder this, impeding the implementation of Aarhus' green transparency norms in the EECCA area. Following the USSR's fall, Hurrell issued a "long and depressing" list of barriers to post-Cold War environmental protection in the former socialist world, including the way in which

...incomplete understanding of the long-term costs of environmental damage leads to a reluctance to assume the short-term costs of environmental reforms; the extent to which...economic, political and social problems and high levels of...instability make...long-term planning extremely difficult...; the manifold weaknesses of environmental bureaucracies, lacking technical knowledge, political...clout, or financial resources;...[and] the extent to which...democratisation...may not only...empower those seeking to improve the environment...but...those (often entrenched...elites) most...opposed to the implementation of tighter controls (1994: 156).

To understand these legacies, and the mistrust culture that hinders green governance in the EECCA region today, one must delve into the past. In the Soviet era, the USSR was determined to conquer nature, relentlessly expand industry, and invest all hope in the capacity of science to solve the USSR's environmental ills (Ziegler 1987: 154). Towards the end of the Cold War, Ziegler noted that whilst Soviet socialism assigned some value to public participation, "popular participation in environmental protection was...extremely limited and largely symbolic. Political participation by those who are neither officials nor specialists is confined to the output side of the policy process, even in the least sensitive issue areas (Ibid: 155). Harman-Stokes would agree, arguing that the former socialist world "faces devastating legacies from its social traditions. Built upon secrecy, fear and intimidation, Stalin's totalitarian leadership developed a culture devoid of democratic

characteristics” (1995: 80). A mistrust culture emerged in which officials either withheld, or issued false, information, fearing that the truths of environmental harm would incur severe punishment (Ibid: 81). This mistrust deepened the reticence between citizens and officials, increasing public wariness of ‘official’ data. This left a legacy of former socialist countries lacking “a ‘rule of law’, a ‘civil society’, a democratic culture, or even a tradition of public free thought, free choice, or free speech” (Ibid: 81). Toth, overtly assessing Aarhus, substantiates this, noting that former socialist territories’ “political and legal systems privileged the state over the individual, and were not accountable to the public at large in any meaningful way...The broad tradition of state secrecy...led to a number of state secrecy laws being passed soon after the emergence of freedom of information legislation, suggesting that old habits die hard” (Toth 2010: 327).

These ‘old habits’ should not eclipse the limited progress towards achieving environmental transparency in the USSR. In the 1960s, “citizens rallied to halt plans for...polluting facilities on Lake Baikal” and “protests arose over pollution of the Volga..., the siting of nuclear power plants...and air pollution throughout the Soviet Union (Harman-Stokes 1995: 94). Between 1960 and 1985, “Soviet society seemed...stable, but it was a period of intensive emergence of civic initiatives” (Yanitsky 2012: 923). In the 1960s, *Druzhinnoe dvizhenie*, Nature Protection Corps, emerged. Its early creation, in the Cold War, is crucial. It firstly indicates the extent of green harm in the USSR, compelling citizens to express their grievances, and risk punishment accordingly. It secondly indicates that “‘perestroika from below’ had been launched long before its official announcement by Communist... leaders” (Ibid: 923). For Yanitsky, whilst the party-state was ostensibly “the supervisor of all social life...the spheres of free exchange of information were growing ever more numerous and intensive”, and unshackling themselves from central political control (Ibid:

924). Under this logic, the politico-social liberalisation of the late 1980s had been bubbling under the USSR's surface – but not erupting – two decades prior to Gorbachev's reforms. These tentative steps towards democracy set the context in which Soviet society would, between 1985 and 1991, attune itself increasingly “to violations of basic human rights” and environmental harm (Ibid: 925).

1988 witnessed the creation of the first USSR-wide ENGO, Socio-Ecological Union (SEU) (Ibid: 925). Democracy was as important a priority for SEU as the environment (Ibid: 925). For Zaharchenko, “Secrecy and deception, together with the regime's self-confidence... began crumbling during perestroika...Glasnost...became an officially endorsed if not yet fulfilled policy of openness and of making officials more accountable to the public” (2009: 3). Also in 1988, *Goskompriroda*, the USSR State Committee for Protection of Nature, was created (Ibid: 4). A year later, the USSR adopted a “groundbreaking” All-Union Law on the Order of Appeal to a Court of Illegal Actions of State Bodies and Officials Infringing the Rights of Citizens (Ibid: 4). Until this was codified, “citizens could not go to a court...to challenge public authorities” (Ibid: 4). However fragile, these early provisions constituted “the first bricks paving the way to opening up government” and offered “a breakthrough in the political system and legal doctrine, signalling the beginning of a new era” (Ibid: 5). And these provisions were used in earnest. In 1992, SEU brought a case to the Supreme Arbitration Court against Russia's decision to waive taxes for a Russo-American oil joint venture (Ibid: 7). SEU lost, but this early litigation was “a powerful illustration that the time for NGOs to use legal strategies had arrived...The air at the time was filled with talk about building the rule of law and civil society” (Ibid: 7).

However, it must be stressed that there is considerable value in Toth's dictum that 'old habits die hard'. Notwithstanding the limited progress towards green transparency in the USSR, Soviet traditions of corruption, secrecy, mistrust and mismanagement were apparent long before Chernobyl. On 29 September 1957, the closed city of Ozyorsk suffered the world's third-severest nuclear disaster, a Level 6 incident (one tier below Chernobyl) (see Harman-Stokes 1995). Ozyorsk is located near the Mayak (Chelyabinsk-65) nuclear facility. There, a cooling system, for a tank holding 100 tons of radioactive waste, failed. An explosion caused a radioactive cloud travelling several hundred kilometres. It took nearly two years for some evacuations to occur. The disaster was a "long-concealed nuclear accident" causing several thousand deaths, circa 11,000 evacuations, and a ban on farming for up to twelve years in a 400-square-mile exclusion zone. Despite this, "authorities denied reports of an accident until the late 1980s" (Ibid: 90). Between 1957 and 1961, the nearby Chelyabinsk-40 pumped 1.2 billion curies of nuclear waste into Lake Karachay, which partially evaporated in 1967. Subsequently, radioactive dust was blown from the lakebed up to fifty miles away, affecting circa 41,000 people. In 1986, the reservoir and adjacent groundwater contained radioactive content "nearly twenty-four times that of the material released from Chernobyl" (Ibid: 91). Lake Karachay is reportedly the most polluted place on earth, and in 1990, one hour spent there would result in death (Ibid: 91).

This Soviet tendency to neither confirm nor deny disasters, and withhold lifesaving data, resurfaced in the Chernobyl crisis, 1986. There, a nuclear power station safety experiment failed, causing a catastrophic explosion and a hitherto unprecedented discharge of radioactive waste into the atmosphere. The environmental and health affects in Belarus, Ukraine and wider Europe are still surfacing. This was a turning point at which demands

for green transparency were articulated in the USSR. It stimulated, in no small part, the green movement in Soviet and post-Soviet space, catalysing *glasnost*.¹⁹⁶ For Zaharchenko, this disaster prompted “the emergence of an environmental movement in the Soviet Union”, symbolising “the failure of a system...that did not recognise the state’s obligation to provide environmental information to the public” (2009: 3). Citizens had listened “to international radio...for three days before the first vague...announcement was made about the enormous accident” (Ibid: 3). Substantive data only surfaced “after Swedish authorities publicised the release of radiation from the area” (Harman-Stokes 1995: 95). Of most concern is that three years passed before the first still unclear assessment of the accident’s severity was published (Zaharchenko 2009: 3).

Chernobyl prompted the Ukrainian Soviet Socialist Republic to issue a 1990 Decree mandating the State Committee for Nature Protection to collect “all relevant environmental information” and “disseminate it to the public through mass media” (Zaharchenko and Goldenman 2004:234). Other such laws surfaced. But recall Zaharchenko and Goldenman’s observation that in almost every Soviet and post-Soviet territory where this legislation emerged, “such laws were usually preceded or followed within two years by laws on state secrets” (Ibid: 235). From 1958 to 1982, 159 Soviet environmental laws were enacted, with each republic responsible for applying them in their own jurisdictions (Harman-Stokes 1995: 96). Codification was not the problem; the lack of enforcement *was*. For Harman-Stokes, “a lack of effective enforcement...left most of these statutes meaningless” (Ibid: 96).

¹⁹⁶ See Harman-Stokes: “The official secrecy...forced people to question Moscow’s credibility worldwide. Within the Soviet Union, the incident opened the floodgates of protest against central authorities...There is no doubt that...Chernobyl...propelled many environmental movements that followed” (Harman-Stokes 1995: 95).

Toth is therefore not too contentious in claiming that ‘old habits die hard’. The researcher recently learned that Russia is coming close to acceding to Aarhus (via P10). But these Soviet legacies, not least the mistrust culture, jeopardise its accession. Take, for instance, *Fadeyeva v Russia*, a case taken to the ECtHR in 2005 (Pedersen 2008: 88). The complainant lived 450 metres from a steelworks in Cherepovets, north of Moscow. Reports found that “the Soviet-era plant contributed more air pollution than any other metallurgical plant in Russia, and its emission levels exceeded domestic standards” (Ibid: 88). Regulators established a “sanitary security zone” to protect residents, but eventually ordered them to resettle without aid (Ibid: 88). The ECtHR found that a violation of Article 8¹⁹⁷ of the ECHR had occurred, ruling that “there is no indication that the State designed or applied effective measures which would take into account the interests of the local population...and which would be capable of reducing the industrial pollution to acceptable levels” (Ibid: 88). This vignette is one instance of a lack of substantive environmental protection, and reluctance to aggregate public interests into environmental and industrial planning, in contemporary Russia.

In the broader EECCA area, it has become increasingly common that only ‘legal’, formally registered NGOs are able to procure funding. Complex processes increasingly hinder the registration of new NGOs. One illustration of this is Russia’s recently (2012) codified Law on Foreign Agents. On 21 July 2012, President Putin signed into law a divisive bill entitled *Introducing Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-Commercial Organizations Performing the Function of*

¹⁹⁷ See European Convention on Human Rights, Article 8(1): “Everyone has the right to respect for his private and family life, his home and his correspondence” (ECtHR 1950: 10).

Foreign Agents (Council of Europe 2012). The law obliges all NGOs, wishing to conduct political activities, to register with the Russian Ministry of Justice before they can receive funding from overseas donors. NGOs that fail to register “can be suspended for up to six months, by simple decision of the authorities without a court order” (Ibid). Similar difficulties surfaced in Turkmenistan, the first Central Asian state to sign Aarhus in 1999. Four years later, Turkmenistan enacted a Law on Public Associations, curtailing rights of public association and requiring all NGOs to reregister with the government. Unregistered NGOs were illegalised. For Weinthal and Watters, this law caused “the virtual destruction of civil society in Turkmenistan, as practically all independent NGOs were denied reregistration, including the two oldest and most respected environmental NGOs in Turkmenistan: the Dashowuz Ecology Club and Catena” (2010: 793). The implication is that whilst former socialist territories are at liberty to sign Aarhus and ostensibly pursue its stricter standards of civilisation, the reality may be strikingly different.

Such policies have a “demobilising effect on environmental activism” (Yanitsky 2012: 928) that is compounded by a “violent entrepreneurship” in the former socialist world that sidelines environmentalism altogether (Ibid: 930). Fieldwork corroborates such concerns. Considering why a hypothetically new country might join Aarhus, an academic implied that some states are less sincere in their intentions than they profess. Some states have signed Aarhus with scarce concern for the ramifications of membership, and their duties:

...if you are a new country and you want to join, you have to ask yourself whether you are ready or not. And...go through that consciously, not just because you want to be a part of the international community. If your new country is a democracy, with freedom of speech, with the rule of law, then this Convention will...give you the means to achieve that. If your *real* aim,

if your *real* goal, if the values on which your country stands are the ones I've mentioned, then the Convention will give you a completely international experience, that you can use to achieve a lot of things – if you're *really* pursuing the areas you announced (P10).

A NGO manager echoed this, admitting that Aarhus is stricter than the regulatory frameworks of “the former Soviet bloc countries where democracy is still far away” (P12). Indeed, at the third meeting of Aarhus’ Task Force on Public Participation, it was noted that some EECCA authorities deemed public participation a hindrance, choosing to “involve the public only at the more general...level of decisionmaking...and then not to do so again at the time of decisionmaking on specific projects relevant to those plans” (UNECE 2013f: 7). Embedded work also revealed that whilst NGOs in the EECCA area can theoretically spark environmental litigation, they are often denied actual standing, and often obstructed in their endeavours (F2). It was claimed, during embedded work, that scope for justice is regularly foreclosed by states; vested political and economic interests often prevail over public and environmental ones (F2). Concerns were raised that NGOs registered in one EECCA state are often unable to operate elsewhere in the EECCA region (F2). Embedded work also elicited a prevalent sentiment that EECCA citizens are fearful of applying environmental law, perceiving litigation as a dangerous pursuit (F8). Such concerns were acknowledged by an environmentalist with experience of Aarhus capacity-building and compliance (P14). They argued that “a totalitarian state...would identify...the limited number of people who challenge [the administration] and they would take them out ruthlessly...And there are elements of that going on” (P14). This informant identified places “where the political process is very strongly administrated still, where civil structures are weak and will be dovetailed to meet whatever political agenda is there, and

in those countries things have been signed but they haven't been kept to" (P14). A lawyer from a former Eastern Bloc country also remarked: "we have a low rate of implementation ...We still find problems implementing the first two pillars. The third pillar is not implemented at all" (P1).

The aforementioned NGO manager stated that Aarhus still faces difficulties in the EECCA area, arguing that "we are willing to work with civil society...but not...the totalitarian regimes. Although we do have [omitted] as a Party...and I mean that is *ridiculous*. You know, they put their NGOs in prison...So there are still many, many, many problems" (P12). Zaharchenko and Goldenman (2004) drew similar findings in their fieldwork. They interviewed a Kazakh who "questioned how the public could know what information was important. He insisted that only scientists knew and could decide what information should be made available to the public: 'My six-year-old...asks me a lot of questions, but I as her father know what should or should not be answered'" (Ibid: 236). The authors noted that, even in 2000, Ukraine's Ministry of Ecological Safety and Natural Resources "refused to introduce agency-wide email...All electronic communications with the outside world had to go through one computer supervised by an official authorised to receive and send emails" (Ibid: 236). Albeit fourteen years old, this finding signals divergence between Eastern and Western approaches to transparency and the information revolution, *within* public administrations as well as between officials and citizens.

In another of Zaharchenko and Goldenman's interviews, an EECCA official stated "that 'it is good for people to think and...talk about democracy, but it is important for society that government...maintain[s] strict order and control at all times'" (Ibid: 239). 'Order and control' autocracy only accommodates a society and judiciary that sympathise with the

incumbent administration. This protects pro-state participation, whilst hindering healthy democratic dissent. An elite would be able to ‘think and talk about democracy’, whilst ‘command and control’ autocracy would monitor and regulate the wider public. Such an approach is rooted in the impenetrable power core of the Communist Party:

...interference in litigation by Communist Party officials was common. At the same time, no civil action brought to the court was as frightening to a director of a major polluting plant as a call from the local Communist Party office...The Communist Party played a law enforcement role whenever it believed laws needed to be enforced, which left little room for the authority of the judiciary to develop (Ibid: 241).

Such ‘order and control’ was evinced by an EECCA state representative during embedded work (F8). This delegate accepted calls for the EECCA region to become more transparent, participatory and adherent to the spirit of the Convention. But the speaker added the caveat that *state* officials, as well as citizens, became more empowered. It was cast as an injustice that citizens were being equipped with influence and autonomy, when in fact the central bureaucracy needed such tools in order to discharge their Aarhus duties (F8). This delegate tried to demonstrate their ‘democratic’ acumen by disclosing (a) their direct and unimpeded lines of communication with the state judiciary and (b) their capacity to vet and sanction NGO activities and litigation with ease and immediacy (F8). To them, this was democracy: an intimacy between state, society and judiciary, ensuring that each actor fought for the same cause. This contrasts with the assumption that a forceful, harmonious consensus between state, society and judiciary would surely stifle debate and democracy (F8).

Later, in embedded work, an NGO delegate from the EECCA area arrested the attention of this researcher by reassuring the conference that the state, in which this NGO was registered, was indeed making progress towards green transparency and democracy. This researcher initially expected reticence between the NGO delegate and the respective state representative. Much to the author's surprise, however, the above harmonious consensus manifested itself. The NGO delegate spoke on the state's behalf; the state delegate contentedly let the NGO speaker enumerate the state's achievements, without masking its apparent affinity with the government in question. The researcher noted that whilst such harmony could be superficially interpreted as democratic, it was in fact a remanifestation of Soviet centralisation, 'command and control' paternalism and a patronage politics whereby supporters of the incumbent administration would have participatory privileges bestowed on them (F8). Indeed, one environmental campaigner feared for green activists exercising their Aarhus rights in the former communist world (P7). This participant refused to cite individual EECCA states. Ambiguous but poignant claims were made that "different cultural traditions and cultural barriers" were hindering implementation in the EECCA area (P7). Former socialist territories in the EECCA region were said to be "still dealing with previous fears" (P7). Further, a civil servant, referring to the EECCA area, claimed that "states don't understand what sort of Convention they've signed. It's very difficult to implement the Convention in practice" (P6). For Zaharchenko, such difficulty is attributable to "the habits and traditions of Soviet-era governance...The absence of a philosophical and legal concept of government accountability...kept blocking attempts to transform post-Soviet societies, while the move toward free markets and privatisation that made information a valuable commodity did not inspire often-impoorished public officials to share it with the public either" (2009: 8). She concludes that post-Soviet green transparency laws have often been games of 'hide and seek' – "sometimes coming close to

granting public access but never completely getting there” (Ibid: 9). The inadequacy of green transparency in post-Soviet space was acknowledged by an inter-parliamentary assembly of the Commonwealth of Independent States (CIS), which – one year before Aarhus’ signature – proposed a model environmental transparency law. But no laws moulded on this were enacted by CIS states (Ibid: 10). Post-Soviet space has professed commitment to the cause of democracy, and environmental rights; far more needs to be done.

Democratisation

There is no doubt that for EECCA countries implementation of the Aarhus Convention is an exercise in learning tools and skills of democratic governance based on accountability and transparency.

Zaharchenko and Goldenman (2004: 245-246)

Against this backdrop of Soviet legacies and residual mistrust, it is understandable that Aarhus’ implementation in the EECCA area is as uneasy and problematic as its link with broader democratisation. Perceived democratisation is not always embraced in the EECCA area. One recalls Honneland’s claim that when Western actors “pursue politics filled with ‘sustainability slogans’ – the Murmansk-based newspaper *Polyarnaya Pravda* once talked of ‘fanatic democrats’ – or keep referring to the need to...ease the nervous *narod* [people], many Russians tend to become insecure about the real motivations of Western governments” (2003: 139). Zaharchenko and Goldenman conducted interviews with EECCA state officials, to gauge common sentiment on Aarhus in the former socialist

world: “In several interviews, activities to implement the Aarhus Convention were described as ‘propaganda and education’ – terms straight from the socialist past” (2004: 235). Such fears of ulterior Western motives are attributable to the fact that EECCA states are embryonic democracies. They are new to democracy, transparency and liberalisation. They lack the well-consolidated regulatory architectures that govern decisionmaking in advanced democracies. After the fall of the Berlin Wall, these states had to overcome an ‘initial inertia’, taking tentative steps towards liberalisation and democratisation. (Green) transparency and democracy were new and radical. The uneasy, rapid, environmentally degrading transition from state socialism to what Yanitsky terms “wild capitalism” resulted in green protest being the first form of political protest in the former socialist world (2012: 923). This newfound, hungrily embraced capitalism “intoxicated policymakers and society” (Zaharchenko 2009: 6), leaving little room for a clean, healthy and just environment in the aftermath of the USSR’s collapse. Such ‘wild capitalism’ was equally accompanied by a newfound, hungrily embraced, unexplored green protest movement.

Glasnost and *perestroika* had prompted public debate and participation in an embryonic civil society (Weinthal and Watters 2010: 785). Synergies had emerged between activists and officials who wished to lobby Moscow on environmental issues. But when the USSR fell, former Soviet territories had to manage their environment alone. Moscow was not responsible any more, and local expertise was lacking. Officials who had once lobbied Moscow were now being scrutinised by the very citizens with whom they once cooperated. The (literal and figurative) distance that once separated Moscow from its satellites now began to divide former socialist administrations from their citizens.

Recognising the risks of these fractures between EECCA administrations and citizens, Aarhus practitioners were quick to promote capacity-building. According to Weinthal and Watters, “many international organisations and bilateral aid programmes such as those of the World Bank and the United States Agency for International Development (USAID) were...seeking to expand the scope of their donor assistance programmes so that the environment would become an essential component of economic and political development” (2010: 786). Assistance entailed not only basic capacity-building, but major operations like “river cleanups, water monitoring... alternative energy and the development of environmental education” (Ibid: 788). For this reason, EECCA administrations began to suspect the presence of vested interests using the environment as a cover for ulterior motives. NGOs and assistance initiatives conducting such activities faced ever stricter state regulation (Ibid: 788).

The key capacity-building actors are Organization for Security and Cooperation in Europe (OSCE), Regional Environmental Center (REC), UN Environment Programme (UNEP), UN Development Programme (UNDP), UNECE and NATO. These, and most saliently OSCE, support the creation and operation of Aarhus Centres and Public Environmental Information Centres in such countries as Albania, Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan and Tajikistan. Awareness-raising and implementation is but one goal of these initiatives. Their ultimate objectives are more expansive. Citing broader environmental capacity-building centres in post-Soviet space, Yanitsky notes that whilst they pursue such issues as “fundraising, social protection, human rights, ecology, education [and] science”, their overarching goal “was much wider: to assist in the development of civil society...in *any field and form*” (Yanitsky 2012: 930; emphasis added). UNECE does not deny this, and indeed observes that Aarhus is “seen by many as a tool for democratisation” and that

capacity-building and financial resourcing is “a cost-effective investment, a way of cheaply and effectively *spreading democratising principles* around the world (UNECE 2013b: 35; emphasis added). Petkova and Veit draw the wry conclusion that many Western governments “tend to view the [broader] *Environment for Europe* process as no more than a learning exercise for Central and Eastern European countries, with little relevance for their own environmental regimes” (2000: 10). Such claims are corroborated by a barrister, who remarked, in an interview, that they had always deemed Aarhus “a post-Berlin Wall law: here’s the West, we’ve got all these marvellous principles, and we’re going to give them to you...That was a big part of the higher level political motive” (P21). Embedded work ascertained that major efforts are now being invested in capacity-building to ensure Aarhus is effectively implemented in the EECCA area (F6). A focus on practical initiatives such as moot court training (F7) exemplifies the focus on building *confidence* as well as capacity, to foster a culture of environmental citizenship in the EECCA area (F7).

Some consensus amongst the Aarhus practitioner community indicates that Aarhus plays a valuable facilitating role for transition democracies, guiding them on the road to the ‘good governance’ and green transparency that coheres so well with the European project. A NGO manager praised Aarhus for its democratising impact: “I’m not saying that it solves the problem, but it *helps* countries with less democratic systems to at least do something in order to talk to their own citizens” (P12). This speaker deemed Aarhus “a big step forward in the democratic direction” (P12). A lecturer concluded that Aarhus has democratised green governance “a lot...In other spheres, like the economy, social issues and so on, this kind of public participation is not provided. It’s due to the Aarhus Convention” that environmental decisions are more transparent and participatory (P10). Nevertheless, the Convention is “not embraced enthusiastically” throughout the EECCA area: “If it was

accepted enthusiastically, we would have another picture entirely, in the field of environmental protection” (P10). A diplomat praised Aarhus for its presence as a support mechanism for transition democracies that need guidance on their path to transparency and ‘good governance’ (P4). The claim was made the states most in need of such support “come from the Soviet era. They are not used to respecting the will of the people, the claims of the people to respect the environment. The fact they are involved in this Convention, that they participate within it, is very important for them, and is very important for building an area where the environment is more protected” (P4).

This sentiment was echoed by another participant, registering Aarhus’ “transformative” democratising effect “on legislation and practice throughout the region...it’s most obviously done that in the Eastern countries where we still have big challenges with implementation” (P16). This informant was keen to stress that whilst many EECCA states had to act quickly, after signing Aarhus, to meet its legislative requirements, this was “equally true with the Western countries: the European Union...has had to significantly upgrade its Directives in the areas of information and participation...So even the more progressive part of the region, before Aarhus came along, had to make very significant changes” (P16). Nevertheless, the speaker noted Aarhus’ particularly strong influence in the EECCA region. Aarhus was said to have

...strengthened the rights of the public...in a vast swathe of countries across Europe and Central Asia...It’s very nice to see when the Aarhus countries are in global fora: just to see the standards of consciousness around the whole issue – so much more advanced in a way. There’s much greater awareness of these rights in the Eastern European and Central Asian participants in those global fora (P16).

With this in mind, an environmentalist with experience of Aarhus capacity-building and compliance was adamant that Aarhus has a promising democratic influence (P14). They remarked that in the Soviet era,

...the state dictated everything, and you had a legacy of large polluted sites and...heavy industry badly brought out...So there is a strong culture there that *this will not happen again*. And that the state will not dictate...the manner in which projects are implemented...And that is very much at the core of the Convention: the public will be given the right to directly participate in the decisionmaking process...You *don't lobby the political process* and the media: you actually have a *structure* that you go through (P14).

Under this logic, Aarhus has helped bring democratic good governance to the EECCA region, in the context of environmental transparency.

Conclusion

This chapter assessed the degree to which Aarhus is associated with democratisation in post-Cold War Europe, asking whether the rigour of implementation depends on Parties' political cultures. In advanced democracies, of the type found in the 'western' EU and Scandinavia, Aarhus appears successful. It has a democratising impact, in that Parties seem committed to implementation and compliance, and have altered their laws and practices to accommodate the Convention's stringent demands. But this may not be wholly attributable to Aarhus *per se*. Such commitment accrues from the European and Scandinavian states

possessing the robust regulatory architectures, and cultures of tolerance and participation, needed for Aarhus to flourish. Nevertheless, fieldwork gauged two presuppositions that regularly emanated from practitioners: (a) the need for permissiveness and progressiveness and (b) the need for active environmental citizenship.

Regarding the first presupposition, advanced democracies are well-equipped to internalise their Aarhus duties and empower citizens to alter their circumstances through active political influence. Advanced democracies, with a tradition of human rights, equality, diversity and fair representation, are positioned to safeguard Dagger's "autonomous person", who "adopts the principles by which he or she will live" (1997: 15). Crucially, if they "truly *choose* the principles that guide their conduct, autonomous people must *be aware* of the alternatives from which they can choose and *be able* to think critically about them" (Ibid: 38; emphasis in original). Particularly in the western EU and Scandinavia, a culture of permissiveness and progressiveness offers the context in which citizens can use their rights of choice and autonomy within the law. Autonomy implies "consciousness, of the capacity to make choices upon reflection" (Ibid: 28). This thesis follows Dagger's notion of autonomy as a fundamental right, requiring "us to respect the dignity of the person: to treat others...as individuals who are capable...of forming plans, entering into relationships, pursuing projects, and living in accordance with an ideal of the worthwhile life" (Ibid: 31). The right of autonomy, which Aarhus fosters in the green realm, "is the right, not to receive the same distribution of some burden or benefit, but to be treated with the same *respect* and *concern* as everyone else" (Dworkin in Ibid: 31; emphasis added). Autonomy warrants "an awareness of the choices available to us...and an awareness of our capacity to choose. If we are to lead self-governed lives, we must first be able to think of

ourselves as something more than objects at the mercy of outside forces, like so many leaves tossed about in the wind” (Ibid: 38).

Advanced democracies are well-equipped to safeguard such autonomy, and enact it in the green realm. Aarhus is a valuable tool with which autonomy can be more solidly cemented in the context of green governance. Aarhus *confirms* human empowerment in the western EU and Scandinavia rather than catalysing it. It adds weight to Eckersley’s claim that

...the opportunity to participate or otherwise be represented in the making of risk-generating decisions should literally be extended to all those potentially affected, regardless of social class, geographic location, nationality, generation or species...Indeed, ecological democracy may be best understood not so much as a democracy *of* the affected but rather as a democracy *for* the affected (2004: 112).

Although Aarhus does not secure Eckersley’s green democracy in Europe, it arguably equips this region with the tools for rendering domestic governance practices even more transparent, participatory and environmentally conscious. This is of solidarist significance. Contemporary ES thinkers agree that Europe is an apt model for a regional international society, given that “First, Europe conforms to the basic defining condition of *regional* interstate society; and second, that within this region, the possibility exists...for a broadly integrative and solidarist movement toward cooperation and convergence” (Stivachtis 2014: 118). Such integration is attributable, not least, to the many liberal states converging in this region, noted for their permissiveness, progressiveness and human rights record. Miller thus correctly notes that the EU, perhaps “the forerunner of a world state to come,

has achieved such legitimacy as it presently enjoys by drawing upon the common political heritage of a group of liberal states” (2007: 26).

Regarding the second presupposition, of the need for active environmental citizenship, work for this chapter detected a sentiment, in the Aarhus community, that citizens must ‘help themselves’. Practitioners demanded active environmental citizens who (a) help themselves *to* Aarhus’ participatory opportunities, and (b) help themselves *from* apathy, reticence towards official decisionmaking structures, and the tendency to freeride and let NGOs work on their behalf. One practitioner, during embedded work, called for citizens to be ‘in it to win it’. This echoes a palpable demand, within the practitioner community, for a greater sense of active environmental citizenship within Aarhus Party jurisdictions. Some practitioners demanded ‘critical friends’ who are neither on the inside of power orthodoxies, nor dissociated from them. Such ‘friends’ are, rather, ‘*on board*’, and willing to offer candid counsel without fear or favour.

This notion of active citizenship is compelling, and has solidarist value. It has already been agreed that autonomy is the right not only to be treated with equal concern and respect, but to exercise choice so that one can lead a ‘self-governed life’ and unshackle oneself from imposed harm. With autonomy, however, comes duty. The right to autonomously lead a self-governed life depends on the *duty* to alter one’s circumstances by influencing potentially harmful decisions. Autonomous self-governance is unattainable unless citizens take it upon themselves to alter their own circumstances by participating in the democratic process. This is stimulated by “the desire to do one’s part in the cooperative endeavour”, which “fosters a form of civic virtue – of acting for the common good even when it proves personally painful” (Dagger 1997: 79). Indeed, the demands placed by Aarhus practitioners

upon citizens in Party jurisdictions are decidedly civic republican, given that the ideal ‘Aarhus activist’ is, to draw on Dagger’s civic republicanism, someone who “respects individual rights, values autonomy, tolerates different opinions and beliefs, plays fair...and takes an active part in the life of the community” (Ibid: 196).

By espousing such active citizenship, Aarhus retains the comfortable familiarity of sovereign statehood, whilst enjoining active citizens to enrich it from within. This has a cosmopolitanising effect, enhancing political orthodoxies with an injection of much-needed human capital. The statist status quo becomes more solidarist, ethically ambitious and human-oriented, without losing the orthodox political framework that is so essential for developing cosmopolitan values. It is this harmony between political orthodoxy and human capital that creates the *civitas* underpinning advanced liberal democracy. For under Aarhus, citizens remain allegiant to states, but assume the duty to enrich that status quo with their own democratic participation, with the view to altering and *improving* their own circumstances. This is civic republican, but also cosmopolitanising, as it locates the human individual at the core of the state’s concerns. Aarhus’ call for proactive citizens is therefore civic republican in its “focus on the common good and the related elevation of responsibility over rights, the stress on political virtue, and the idea of the active citizen” (Dobson 2006: 222), yet it retains states as the referent points around which citizens rally. Sovereignty becomes more responsible and cosmopolitanised.

These presuppositions of active citizenship, and permissiveness and progressiveness, underpin a political culture, in the western EU and Scandinavia, most conducive to Aarhus’ successful implementation. But it would be naïve to suggest that such a cosmopolitanising force is transforming a European regional international society into

something more, such as a regional world society founded on cosmopolitan values. Firstly, the EU has yet to codify a ‘pillar three’ directive on environmental justice. This indicates a latent, embryonic green transparency regime, which has cemented the more feasible and agreeable first two pillars at the expense of the third. Secondly, narrow *locus standi* are as serious a problem in advanced democracies as they are in the EECCA region. This only serves to exacerbate, thirdly, the residual mutual mistrust – albeit a more diluted and unspoken mistrust than that of the EECCA region – between state officials and civil society.

Fourthly, and most crucially, inequities exist *within* the EU. It would be incorrect for this thesis to generalise the EU as one western, post-Berlin Wall community. It is not. The EU is not a level playing field on which Aarhus can be implemented; neither will it be in the foreseeable future. This thesis sympathises with Eckersley’s view that the EU offers the richest evidence “of a greenish Kantian culture, with intimations of a post-Westphalian culture, and this is partly explicable by the close geographical proximity of states and a shared history...in relation to security and ecological problems” (Eckersley 2004: 47). But in reality, the EU is not a uniform region in which Aarhus enjoys unvaryingly successful and rigorous implementation.

This leads to the findings regarding the former socialist world. It is telling, at the very least, that Reus-Smit has identified “a recurrent theme in which domestic struggles for individual rights link into anti-imperial struggles and the pursuit of sovereign equality within international society” (Buzan and Little 2014: 67). For it can be difficult, and occasionally mortally dangerous, for persons in the EECCA region to exercise their Aarhus rights. EECCA administrations are hindered by legacies of autocracy, mistrust between

officials and citizens, supremacy of states over individuals, secrecy, corruption, human rights neglect and environmental mismanagement. These legacies not only hinder the immediate implementation and application of the Convention in the EECCA region. The deeper implication is that such legacies (a) impede the broader socialisation of states on both sides of the once Cold War divide; (b) stifle the normative and geographical expansion of the European regional international society; and (c) reduce the chances of solidarism developing, in a more concerted fashion, in post-Cold War European IEP. In lay terms, it appears difficult to reconcile East and West, even in today's ostensibly post-Cold War Europe. Consequently, the very sense of a *society* of states, united by shared environmental concerns across borders, is jeopardised by an EECCA region struggling to fulfil the duties it has professed to pursue.

This finding echoes Donnelly's claim that, in the post-Cold War era, "we face an immense gap between getting rid of old forms of human rights violations and establishing rights-protective regimes" (1993: 145). Donnelly asks his readers "not to overestimate the extent to which international human rights ideas have penetrated national human rights practices. In particular, we must be careful not to confuse decreased tolerance for old forms of repressive rule with support for, let alone institutionalisation of, rights-protective regimes" (Ibid: 146).

To remedy this, and ensure that EECCA states trod the path of green democratisation on as solid a footing as possible, capacity-building was demanded and instigated early following Aarhus' signature. Capacity-building strengthened the green movement that had emerged during, and consolidated after, the Cold War. Work for this chapter identified a relative consensus supporting this capacity-building and democratising endeavour. The researcher

found that many scholars and practitioners ascribed great value to the effort taken to reconcile East and West, share best practice, and render the EECCA area greener and more democratic. However, some stakeholders doubted such endeavours, fearing the presence of Western ulterior motives, not least given the key financial and facilitative role played by the OSCE and NATO. Residual scepticism of participatory governance itself was identified on occasion. Embedded work was struck by instances of a forced harmony between states and NGOs during events under the researcher's observation in Geneva. A sense of imposed intimacy between states, civil society and the judiciary led the researcher to question whether Soviet command and control autocracy was resurfacing as 'old wine in new bottles'.

Overall, Aarhus' successful implementation is indeed contingent on the type of political culture underpinning its Parties. Advanced democracies in the western EU and Scandinavia began with the prior advantage of possessing cultures of permissiveness, progressiveness, tolerance and fair representation. It was thus to be expected that demands for these, alongside the call for developing active environmental citizenship within citizenries, were articulated in this context. It was also found that Aarhus *is* a democratising phenomenon in post-Cold War European IEP; this is broadly welcomed but is still treated with suspicion in some quarters. Ultimately, Aarhus both demonstrates, and contributes to, a European regional international society, united by shared concerns for environmental protection and democratic good governance. Time will tell if this regional international society expands to accommodate the yet fragile EECCA area, and whether former socialist territories will be wholly welcomed into this greener European international society.

10 Conclusion

There are many reasons for the growing support for a more demanding cosmopolitanism...[M]any NGOs and individuals...feel a growing sense of responsibility for what...Arendt once called that part of the public world that comes within our reach...which we can affect in our daily lives in small but meaningful ways. Concern for the...environment is the most prominent example of a growing sense of responsibility for the earth as a whole.

Linklater (2002: 140)

This project assessed Aarhus' normative contribution to post-Cold War European IEP. It sought to gauge the degree of pluralism and solidarism in the Convention and identify the implications for normative progress in IEP. There were three key findings. Firstly, Aarhus demonstrates the presence of, and contributes to, a greener European regional international society. Secondly, Aarhus has considerable solidarist potential, offering the tools for cosmopolitan human empowerment. Thirdly, however, pluralist realities retain a marked influence. Human empowerment may be latently emerging in IEP, but it is as yet embryonic. Sovereignty remains. And this is a good thing. Incremental, piecemeal cosmopolitanisation of political orthodoxies is morally desirable and practically feasible. Evolutionary reform of the statist status quo is more agreeable than *revolutionary* change, or the pursuit of an unattainable cosmopolis that mistakenly and unsuccessfully tries to usurp sovereignty. World society values, of the sort codified by Aarhus, help render IEP more ethically ambitious, more human-oriented and more responsible. But they will not emerge without a stable political framework in which they can be institutionalised by

states. Aarhus demonstrates that whilst IEP remains *International*, it can still be enriched by the invaluable human element, which states must accommodate if they are to be good international citizens, exercising responsible sovereignty, in the twenty-first century.

A greener European international society

Aarhus demonstrates the presence of, and contributes to, a *greener* European international society. The EU, and the North Atlantic region more broadly, offer the politico-geographic context in which the very principle of international society can be greened. The author agrees with Buzan's claim that the EU "is a pretty advanced case of conscious convergence among states...The so-called 'Atlantic community', or in slightly wider form 'the West', or 'the liberal democracies' represent weaker, but still significant, instances of convergence around liberal democracy" (2004: 148). Under Aarhus, states are socialised into a society distinguished by its green democratic concerns. There is a sense of mutual identification not only between states, but also between states and citizens. There is a sense that states are *attuned* to environmental vulnerabilities in this greener regional international society. The Convention has had a civilising influence on Europe. It sets unprecedentedly strict benchmarks that states must meet to be deemed legitimate members of a greener European international society. If the civilising process encompasses changing notions of shame and a greater need for self-restraint between actors, Aarhus demonstrates Parties' willingness to restrain themselves in the green realm, by limiting environmental harm, and providing citizens with the tools to alter their circumstances by influencing decisions that may harm them. This leads us to find that Aarhus sets a stricter, greener, more democratic standard of civilisation in Europe. The substance of this standard of civilisation is the

procedural trinity, which Parties must apply to be deemed legitimate in the eyes of their counterparts and citizenries.

It is crucial that the ‘western’ EU and Scandinavia already possess the robust regulatory architectures and liberal democratic cultures needed for Aarhus’ successful execution in European international society. The greener European international society, demonstrated and enlarged by Aarhus, exemplifies Buzan’s allusion to the ‘yokes’ of state orthodoxy resting on, and sharing, the ‘whites’ of world society values:

The West is a clear case of...where the yolk is thicker than the white because it represents a wider set of shared institutions. Within the...Western states, some of the things...either...contested at the global level, or held in place by...coercion, are deeply internalised and stable at this sub-global level. Within Western international society the market is...accepted, democracy...more so, and there is agreement on a substantial array of human rights. Individuals and non-state actors have well-established rights and responsibilities, and the...sub-system is laced together with a dense network of...institutions...The West as a whole has achieved...Cooperative status, and is often referred to as the international community (2004: 236-237; emphasis in original).

Fieldwork identified two presuppositions that emanate from practitioners to this end: (a) the need for permissiveness and progressiveness and (b) the value of active environmental citizenship. Both are vital for Aarhus’ contribution to a greener, more democratic Europe. A prevalent culture of permissiveness and progressiveness equips advanced democracies to safeguard Dagger’s “autonomous person”, who “adopts the principles by which he or she

will live” (1997: 15). The extant norms of tolerance, diversity and fairness ensure that Aarhus *confirms* rather than catalyses human empowerment in Europe. The notion of active environmental citizenship has solidarist implications. With autonomy comes the duty to serve as an active citizen when decisions hold the potential to harm oneself. One cannot enjoy the right to autonomous self-governance without accepting and discharging the *duty* to self-govern, and alter potentially harmful decisions. Whilst this symbiosis between the right of, and responsibility for, self-governance is accommodated by advanced democracies, it is more problematic in the EECCA region. Cold War legacies of corruption, autocracy, (literal and figurative) distance between public administrations and citizens, and environmental mismanagement hinder the Convention’s implementation in the EECCA region. It remains ambiguous whether the greener European international society will stretch further to accommodate the former socialist countries, and whether difference and diversity – something revered by pluralism – will ultimately preclude the emergence of a more homogenous, ‘western’, and uniformly democratic Aarhus region.

Solidarism and Human Empowerment

Aarhus has vast solidarist potential, offering vital tools for cosmopolitan empowerment. It indicates that IEP can, and should, be enriched with the invaluable human element. States must accommodate this element to be deemed responsible, ‘good international citizens’ in the twenty-first century. This coheres with Vincent’s claim that “The failure of a...state to provide for its citizens’ basic rights might now be taken as a reason for considering it illegitimate” (1986: 123). Aarhus demonstrates that sovereign international society and cosmopolitan world society are not incommensurable. They complement and strengthen one another. In the ES, there has often been a fear that world society may transcend,

surpass or usurp sovereignty. It has been posited that a shoring up of world society values may lead the political world on the path to cosmopolis. This is untrue. Cosmopolitan democracy and non-state governance *augment* political orthodoxies, enriching relations *between* states. Any notion of a latent cosmopolis unshackling itself from the centuries-old Westphalian states system is unsubstantiated conjecture. Aarhus' finest achievement is to have demonstrated that the orthodoxies of IEP can be incrementally reformed, and enriched by the human element. IEP can be, and has been, rendered more solidarist. It has been cosmopolitanised in an *evolutionary* rather than *revolutionary* fashion. This finding coheres with Bain's understanding of pluralism and solidarism as symbiotic. His approach to pluralism and solidarism "joins the purposive 'oneness of humanity' implied by human community and the practical 'social cooperation' implied by the society of states as distinct yet inseparable parts of a whole" (Bain 2014: 166).

However one should not downplay Aarhus' solidarist achievement. Eckersley theoretically calls for a green constitutionalism, which would create "a robust 'green public sphere'... providing fulsome environmental information and the mechanisms for contestation, participation, and access to environmental justice" (2004: 140). Aarhus actualises this demand, resonating with Linklater's public sphere of empowered citizens, each united by

...(1) their sense of global responsibility, (2) their commitment to the belief that all persons have certain global moral and legal rights in common, and (3) their quest to build 'post-national' constellations which recognize that all persons have equal rights of access and an equal right to influence public deliberation irrespective of citizenship or nationality (Linklater 2007: 35).

It is of solidarist significance that Aarhus assigns environmental rights to humans *per se*. It is equally important that Aarhus imposes duties on states to protect humans, as well as future generations, unable to rectify environmental harm done today. Such an imposition of human-oriented duties on states, and such assignment of fundamental rights to humans *qua* humans, reinforces Aarhus' presence as a cosmopolitan green harm convention. Such harm conventions demand "that care be exercised in an attempt to avoid mental and bodily harm" and announce "an injunction against indifference to the suffering of others" (Bain 2014: 166). Solidarism was also evident in Aarhus' unique presence as 'hard' rather than 'soft' law. This indicates the capacity for solidarist norm enforcement. From this angle, Aarhus is a conduit for good international citizenship, offering the legal 'teeth' for what otherwise risk being blunt, non-binding environmental aspirations.

Pillar one demonstrates Aarhus' solidarist potential. The transition from the *need to know* to the *right to know* is powerful. It empowers citizens to unshackle themselves from the manacles of imposed harm, and adds substance to the cosmopolitan all-affected principle. Knowledge is power; it enables citizens to improve their own lot by altering decisions that may harm them. This thesis does not claim that Aarhus is emancipatory *per se*, but it does conclude that pillar one helps citizens to *free themselves* from the oppression suffered as a result of imposed harm. Again, this cements Aarhus as a cosmopolitan harm convention.

Further, Aarhus mandates passive data disclosure as well as proactive knowledge transfer from state to citizen. This goes some way towards sanctifying human autonomy, the capacity for each person to determine their "mode of life" (Miller 2007: 177). Knowledge is, under pillar one, a fundamental *need*, codified as a basic human right. This safeguards environmental accountability, reflecting cosmopolitan calls for causers of environmental

harm to be held “morally and politically answerable to those who suffer the consequences” (Linklater 2006: 123).

Pillar two also demonstrates considerable solidarist potential. Public participation was found to be a tool for cosmopolitan empowerment and dialogue. This enables citizens to ‘own’ and alter their circumstances, by influencing potentially harmful decisions. Participatory dialogue is a “means of protecting individuals from intended or unintended forms of harm” (Linklater 2005: 144) and therefore bolsters the first pillar’s attempt to reduce and prevent imposed environmental harm. To this extent, it is noteworthy that Payne and Samhat deem transparent and dialogic regimes as holding the potential, at least, to “reflect...what Linklater calls a solidarist international society” (2004: 139).

Solidarist potential was identified in pillar three, whose provisions for the direct enforcement of rights by citizens add substance to Falk’s law of humanity. The latter is “enacted by and for the peoples of the world...a counter-institution intended to expose the abuses of states and the deficiencies of international institutions, and to provide civil society with its own autonomous voice” (1995: 165). Here, the claim is not being made that such a provision attenuates sovereignty. Rather, this study observes the emergence of a more responsible sovereignty, in which states can and must be held accountable for their improprieties by human individuals. Such human empowerment is further promoted by the pillar’s demands for free or inexpensive justice. This helps equip citizens with ‘active agency’, the ability to “reason self-consciously, to be self-reflexive and...self-determining” (Kent 2011: 69). It was found, above, that the *right* of autonomy is accompanied by the *duty* to self-govern and alter one’s circumstances for the better. Such provisions for justice are one means for easing this responsibility.

Solidarism was elicited during the regime analysis. The Compliance Committee shows, at the very least, scope for realising a solidarism that “presupposes the enforcement of not only the sovereign rights of states but also the rights of individuals” (Wheeler and Dunne 1996: 102). The Committee resembles a court, creating its own corpus of case law. Of vital significance is that it empowers individuals to *directly* allege state contraventions. If states are found to have acted in non-compliance, the outcome is inestimably important: a *state* must alter its domestic practices, within its own jurisdiction, because a *human* has expressed and redressed their grievance about a state’s actions. The cosmopolitan value for IEP is vast: greater opportunities for human ‘whistleblowing’, individual redress, and individual legal autonomy regarding states’ legal improprieties, will cosmopolitanise IEP and theoretically render states more responsible and attentive to their citizenries.

Cosmopolitan value accrues in Aarhus’ provisions for citizens to exercise their rights without persecution or harassment (UNECE 1998: 5). It also accrues in Aarhus’ provision for citizens to enjoy their rights “without discrimination as to citizenship, nationality or domicile” (Ibid: 5). These obligations echo what Falk regards as “the essence of a humane approach” to green governance, namely “the assurance that *all* peoples have their individual and collective rights realised” (2001: 222; emphasis added). State borders are rendered relatively immaterial. Ultimately, IEP can be rendered more solidarist if more multilateral treaties (a) impose duties on states where the referent objects for protection are humans rather than other states; and (b) cease distinguishing humans according to their nationality or place of abode. This will, in the European regional international society at least, foster a greater sense of an ecoregional community, knowing no borders.

Solidarism surfaced in Aarhus' normative potential. It is hugely important that any state can join Aarhus. European international society aside, scope remains for global expansion of the green transparency and democracy regime. ECLAC developments substantiate this, as does the abundant cross-pollination between Aarhus and other international fora. The Convention's interactions with other IGOs, regimes and non-Party states such as China and Mongolia, demonstrate how *regionally* solidarist societies "may not yet have manifested their strength sufficiently to underpin any global solidarism, but...might be given some credit for pushing things along to where the logic of like-units is strong enough at least to support" such aspirations (Buzan 2004: 148).

Further, solidarism was elicited in the dialogic nature of Aarhus' internal proceedings. Fieldwork noted a striking degree of state/non-state dialogue. Aarhus' internal proceedings offered a 'level playing field' on which each stakeholder enjoyed an equal chance to hear and be heard. The Convention led by example. Its internal machineries echoed, in a small practical manner, Linklater's call for "democratic structures nationally and internationally which recognise that each individual counts for one and only one. This is one test of a community's commitment to cosmopolitanism" (2002: 141). Such commitment is also evident in the compliance mechanism's provisions for public participation, and enthusiasm for a transparent and collegial approach to compliance, seeking reconciliation between complainants and contraveners.

The Benefits of *Evolutionary* Cosmopolitanisation rather than *Revolutionary* Change

Aarhus achieves *evolutionary*, not *revolutionary*, progress. This is welcomed, as the former is manageable for states and bounded within the comfortable familiarities of orthodox

multilateralism. Particular practical issues, to be expected in political orthodoxies, were found. State consent is the cardinal issue. In reference to pillar one, the right to know relies on state consent. If states follow Aarhus' disclosure provisions, the risk exists that data may be indecipherable. If it is disseminated in a language unspoken by laypersons, it will not empower them to escape imposed harm. In reference to pillar two, the risk is that *public* participation is *NGO* participation, to the detriment of human individuals. The researcher observed problems such as NGO opacity; the risk that NGOs offer a skewed reflection of the good; and a presupposition of NGO superiority. Asymmetries were found between (a) identifiers of, and the identified, decisionmaking participants and (b) the actors taking account of citizens, and those of whom account is taken. State consent is, simply, the lifeblood of green public participation. This is pluralist, if we follow Bain's view that "A pluralist world, in which true law is that to which states have given their consent, is also a world in which...individuals enjoy rights insofar as they are concessions granted by the will of the state" (2014: 160). Regarding pillar three, the practical gravity of direct citizen enforcement is questionable. The benefit of inexpensive or free justice is also debatable. Progress in this regard was only achieved when the provision's shortfalls, and its weak use by a domestic judiciary, were exposed. It is reasonable to expect a large proportion of citizens to *still* avoid pursuing green justice, given the costs – in terms of time, effort and money – involved.

Sovereignty remains the Convention's spine. The Westphalian system, according to which states interact on a formally equal basis, offers the context in which Parties institutionalise their shared concern for green transparency. But whilst sovereignty remains, it has not remained the same. Aarhus demonstrates that sovereignty, in IEP, can be improved. It demonstrates that it is possible, indeed very desirable, for states to exercise *responsible*

sovereignty, a mature, legitimate sovereignty, enriched by the human element. Particular reference is made here to Weinert's notion of democratic sovereignty, which seeks to

...embrace, extend and defend a conception of basic liberties and rights available to each individual, which...undercuts a central feature of... democratic theory, namely the notion that majorities may decide the content of a common good. Rethinking sovereignty in such terms...underscore[s] the notion that sovereignty emanates from and serves the communities in which it resides. A democratic sovereignty...subverts spatial divisions in favour of the development of communities (both domestic and transnational) in conjunction with common good oriented activities. Democratic sovereignty...qualifies the hierarchy of political space by redefining authority in the more human rights friendly language and logic of a common good (2007: 27).

Deeply solidarist in *ethos*, yet *practically* pluralist in retaining the sovereign state as its key reference point, democratic sovereignty gels with Buzan's finding that instances of solidarist multilateralism "require states to redefine how their sovereignty and their boundaries operate, and this is what differentiates solidarist societies from pluralist ones" (2004: 152). States exercising responsible sovereignty serve as IEP's 'good international citizens'. This echoes Gilmore's finding that a reconceived "sovereignty as responsibility, and the increasing pressure applied to states to ensure that they keep to agreements on human rights, are indicative of the evolution of international society in an increasingly solidarist direction" (2014: 18).

Given the residual prevalence of sovereign statehood, there should also be no denial that state consent remains of cardinal importance. *States* remain the endowing actor in IEP. States bestow Aarhus' privileges on citizens. Asymmetries continue to divide benefactors from beneficiaries, again rendering any notion of a latent cosmopolis an unfeasible and undesirable nirvana. Without deliberately contracting Parties, there would be no rights to assign. International order between *states* remains the cardinal springboard from which to seek *human* justice. The invaluable human element *enriches* the statist realities that must be expected, given Westphalia's necessary and impenetrable framework according to which our political world is structured. Yes, there is a lack of non-UNECE accession; a negligible likelihood of a global 'Principle 10' treaty; and irregular regime financing. Each of these indicates the presence of state consent, and a hesitance to go 'beyond the basics' of multilateral cooperation to secure anything more than a 'liveable international order'. Further, the compliance mechanism is susceptible to (a) avoidance by Parties; (b) a lack of 'follow-up' powers; (c) complaints that its legal 'teeth' only 'bite' when domestic courts apply the Convention; (d) concerns surrounding participatory deficits; and (e) concerns that states may be reticent towards alleged competence creep.

To close the thesis, however, this doctorate concludes that it would surely be anomalous to *not* have identified such realities in a multilateral treaty. Aarhus embodies a society of states, united in their shared concern for green transparency, democracy and procedural propriety. It is managed under the auspices of an IGO, following the well-worn path of international law, an invaluable political orthodoxy that is used time and again by states to solve collective problems. Indeed, Mayall argues that international law is "the bedrock institution on which the idea of international society stands or falls" (2000: 94). If the sorts of statist realities, which this doctorate has elicited from Aarhus, eluded the investigation,

there would indeed be cause for concern. Aarhus' strength is to have cosmopolitanised, and rendered more responsible, state sovereignty in one corner of IEP.

The study joins Falkner in concluding that “the persistence of the institution of sovereignty acts as a constraint on the transformative force of global environmentalism, channelling it into modes of political organisation and governance that can for the most part be accommodated within the evolving structures of international society” (2012: 516). And that is a positive thing. This thesis argues that world society values should indeed emerge, but should *augment* the orthodoxies of international society. World society, the human element of international affairs, should accompany, and not compete with, the Westphalian state system. First, this is morally desirable, given the law and order, identity, and stability afforded by (democratic) states. Second, this is practically feasible: well-institutionalised cosmopolitan values and rules will simply not emerge without a stable political framework governed by a society of states. This position coheres with Buzan's claim that “it is important to keep open the idea of solidarism as something that can happen purely within state systems...without necessarily requiring the spillovers into the interhuman and transnational domains” (2004: 142). It also accords with Buzan's fried egg metaphor, that the thicker institutional yokes of regional international societies, such as this greener European society, “would rest on, and share, the common ‘white’ representing the global level” of cosmopolitan world society values (Ibid: 236).

This is an evolutionary, conservative conclusion: IEP benefits most from taking what it already has – states, sovereignty, norm-oriented regimes and international law – and reforming and enriching its extant resources with humanity. From this angle, “cosmopolitanism [is] a moral lubricant that helps the society of states to run more

smoothly” (Linklater 2002: 137). Future research should further elaborate the principle of cosmopolitanisation; future ES scholars should seek to identify the conditions under which the power orthodoxies of international affairs are most likely to be cosmopolitanised. A broader range of empirical cases should, in subsequent work, be examined to identify when, where and how cosmopolitanisation is most likely to be successful in practice. Such scholarship will shed new light on the relationship between world society and international society, and will further demonstrate the value of ES theory in applied IR.

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